LIBRARY
SUPREME COURT, U. S.
FILED
DEC 27 1973

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1009

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,

Respondents.

HAYDEN, STONE INCORPORATED, a Delaware corporation,

Petitioner,

vs.

ALEX M. MARKAKIS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

WALTER S. WEISS,
1900 Avenue of the Stars,
Suite 1800,
Los Angeles, Calif. 90067,
Counsel for Petitioner.

LONG & LEVIT,
RICHARD B. WOLF,
LOIS G. ANDREWS,
1900 Avenue of the Stars,
Suite 1800,
Los Angeles, Calif. 90067,
Of Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
I.	
Opinions Below	1
II.	
Jurisdiction	2
III.	
Questions Presented	2
IV.	
Constitutional Provisions and Statutes Involved	3
V.	
Statement	4
VI.	
Reasons for Granting the Writ	10
VII.	
Conclusion	23

INDEX TO APPENDICES

Page

Appendix A. Findings of Fact and Conclusions of Law of the District Court in and for the County of Carbon in the Markakis Case 1

Appendix B. Findings of Fact and Conclusions of Law and Amendments Thereto in the Piantes Case 6

Amendment to Findings of Fact and Conclusions of Law 12

Appendix C. Amended Judgment. Order of the District Court in the Markakis Case 15

Appendix D. Amended Judgments. Order of the District Court in the Piantes Case 17

Appendix E. Opinion and Judgment of the Supreme Court of Utah in the Consolidated Cases of Markakis and Piantes 19

Appendix F. Constitutional Provisions and Statutes Involved 22

United States Constitution, Article VI, Section 2 .. 22

United States Constitution, Fourteenth Amendment, Section 1 22

Section 61-1-3, Utah Code Annotated 22

Section 61-1-22, Utah Code Annotated 23

TABLE OF AUTHORITIES CITED

Cases	Page
Gomes v. Williams, 420 F.2d 1364, 1367 (10th Cir., 1970)	10
Green v. Brown, 398 F.2d 1006, 1009 (2d Cir., 1968)	10
Hill v. Florida, 325 U.S. 538, 89 L.ed. 1782, 65 S.Ct. 588 (1944)	20
Hormel v. Helvering, 312 U.S. 552, 556, 85 L. ed. 1037, 1041, 61 S.Ct. 719 (1940)	7, 8, 9
Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. .... (Dec. 4, 1973)	9, 10, 13, 21
Perez v. Campbell, 402 U.S. 637, 29 L.ed.2d 233, 91 S.Ct. 1704 (1971)	22
Silver v. New York Stock Exchange, 373 U.S. 341, 10 L.Ed.2d 389, 83 S.Ct. 1246 (1963)	15
United States v. Continental Can Co., 378 U.S. 441, 457, 12 L.ed. 953, 964, 84 S. Ct. 1738 (1964)	8
United Transportation U. v. Illinois Central Railroad Co., 433 F.2d 566, 571 (7th Cir., 1970)	10

Miscellaneous	
House of Representatives Report No. 1383, 73d Congress, 2d Session (1934)	11
Security Industry Study, Report of the Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs, S. Doc. No. 93-13, 93rd Cong., 1st Sess., p. 143	13, 17

Rules	Page
New York Stock Exchange Rule 325	13
New York Stock Exchange Rule 347	9
Proposed Securites and Exchange Commission Rule 15c3-1, 17 C.F.R. 240.15c3-1	13

Statutes

Investment Advisers Act of 1940 (15 U.S.C. Sec. 80b-1 to 8b-21)	15
Public Utility Holding Company Act of 1935 (15 US.C., Sec. 79 to 79z-6)	14
Securities Act of 1933 (15 U.S.C. Secs. 77a-77aa)	11
Securities Exchange Act of 1934 (15 U.S.C. Secs. 78a et. seq.)	11
Sec. 2 (15 U.S.C. Sec. 78b)	3, 11, 12
Sec. 2(3) and 2(4)	19
Sec. 6 (15 U.S.C. Sec. 78f)	9
Sec. 15A(b)(5)(E) (15 U.S.C. Sec. 78o-3(b)(5)(E))	12
Sec. 19(b) (15 U.S.C. Sec. 78s(b))	13
Securities Investor Protection Act of 1970 (15 U.S.C. Sec. 78aaa, et seq.)	15
The Investment Company Act of 1940 (11 U.S.C. Sec. 72, 107; 15 U.S.C. Secs. 8a-1 to 80a-52)	15
Trust Indenture Act of 1939 (15 U.S.C. Sec. 77 aaa-77bbbb)	14
Uniform Securities Act, Sec. 410	22
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Art. VI, Sec. 2	3

Page

United States Constitution, Fourteenth Amendment 3

United States Constitution, Fourteenth Amendment Sec. 1 3

Utah Code Annotated, Sec. 61-1-3 3

Utah Code Annotated, Sec. 61-1-22 .....2, 3, 10, 18

IN THE

Supreme Court of the United States

October Term, 1973
No. .....

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,

Respondents.

HAYDEN, STONE INCORPORATED, a Delaware corporation,

Petitioner,

vs.

ALEX M. MARKAKIS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Utah entered in the above cases on September 27, 1973.

I.

Opinions Below.

A copy of the Findings of Fact and Conclusions of Law of the District Court in and for the County of Carbon for the Markakis case (not reported) is at-

tached to this petition as Appendix A. A copy of the Findings of Fact and Conclusions of Law and the Amendments thereof of the District Court for the Piantes case is attached hereto, as Appendix B. A copy of the Order of the District Court (not reported) in the Markakis case is attached hereto as Appendix C. A copy of the Order of the District Court (not reported) in the Piantes case is attached hereto as Appendix D. The Opinion and Judgment of the Supreme Court of the State of Utah in the consolidated cases of Markakis and Piantes, a copy of which is attached hereto as Appendix E, is not yet officially reported, but is unofficially reported in 514 P.2d 529.

II.

Jurisdiction.

The judgments of the Supreme Court of the State of Utah were made and entered on September 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

III.

Questions Presented.

The Utah Supreme Court held that, because petitioner, a nationwide securities brokerage firm, was not licensed as a broker-dealer by the Utah Department of Business Regulations, respondents were entitled by reason of Section 410 of the Uniform Securities Act,[1] to recover from petitioner a penalty in the amount of the price paid by respondents for securities purchased by them through petitioner. Although the Uniform Secu-

[1]Section 61-1-22, Utah Code Annotated.

rities Act has been adopted by 26 states, the District of Columbia and Puerto Rico, the case appears to be one of first impression, and the published opinion of the Utah Court will have dramatic impact upon the securities industry. The questions presented are:

1. Does the pervasive scheme of federal regulation of the securities industry preempt the penalty provision imposed upon petitioner, which provision produces results inconsistent with the federal statutory objective of promoting the flow of capital through the national economy?

2. Does the application of a state statute, which allows all of petitioner's customers to recover from petitioner the purchase price they paid for securities, unreasonably burden interstate commerce in a way unnecessary to enforce the state's broker-dealer licensing requirement?

3. Does the penalty provision violate the Due Process Clause of the Fourteenth Amendment because of the lack of a rational relationship between the purpose of the statute, which is to enforce Utah's broker-dealer licensing requirements, and the imposition of excessive punitive liability without fault?

IV.

Constitutional Provisions and Statutes Involved.

The Supremacy Clause of the United States Constitution (Art. VI, §2), Section 1 of the Fourteenth Amendment to the Constitution and Sections 61-1-3 and 61-1-22 of the Utah Code Annotated are set out in Appendix F. Pertinent portions of Section 2 of the Securities Exchange Act of 1934 (15 U.S.C. 78b) are set forth in the body of this petition in Section IV.1.

V.

Statement.

In November of 1967, Joe Santis and plaintiff-respondent Alex Markakis, both residents of Price, Utah, decided to purchase stock in Royal Inns of America. Markakis and Santis telephoned Earl Gogasian, a former resident of Price and President of Royal Inns of America, and inquired where they could purchase the security. Mr. Gogasian gave the two men the telephone number of the San Diego office of petitioner, Hayden, Stone Incorporated, a nationwide brokerage house. Markakis and Santis telephoned petitioner and were referred to Don Foley, a registered representative employed by petitioner. [R.T. pp. 71-73.]

Subsequently, on or about November 20, 1967, Markakis placed an order with Hayden, Stone's San Diego office to purchase shares of Royal Inns of America common stock. He made no inquiry whether, and had no reason to expect that, petitioner or any of its employees was registered as a broker-dealer or agent in Utah pursuant to the Utah Uniform Securities Act. [R.T. pp. 74-78.] The total purchase price of the stock was $68,461.26. Markakis sold the securities through petitioner in February, 1968, at a profit of approximately $11,000.00. [R.T. pp. 81-83 and Deft. Exs. Nos. 1 and 2.]

The amount realized from the sale, approximately $80,000.00, was subsequently reinvested by Markakis in Royal Inns of America stock through several transactions handled by petitioner. In the fall of 1969, Markakis was notified by petitioner that Don Foley was entering management training and that Phillip Jay, another of petitioner's employees, would handle his ac-

count. In October, 1969, Markakis sold through petitioner, with Mr. Jay acting as registered representative, all of the stock in Royal Inns of America which he had acquired pursuant to the second purchase (with the exception of 100 shares that had been sold the previous May). The total amount realized from these transactions was $105,484.10. [Deft. Ex. No. 4.]

At trial respondent Markakis testified that upon a recommendation made by Mr. Jay while he was in Price for the 1969 deer hunt, Markakis placed a buy order with petitioner for some shares of stock in Occidental Petroleum and King Resources. Subsequently, on December 18, 1969, Markakis purchased 1,000 shares of Royal Inns stock. [R.T. pp. 52 and 55.] It was these three transactions only that Markakis sought to void by this action. This fact underscores the inequity of the Utah statute; Markakis made a profit of $37,022.84 from the transactions he did not elect to rescind.

Respondent Mary Piantes is the sister of respondent Markakis. After Mr. Jay returned from Utah to San Diego, he had several telephone conversations with respondents Piantes, who had purchased Royal Inns stock previously from a broker-dealer other than petitioner. In November, 1969, the Piantes sold those securities through petitioner at a profit. Later the Piantes purchased through petitioner 200 shares of Blue Chip Stamps stock at a price of $4,300.00. By this lawsuit, the Piantes sought to have only the last transaction declared void.

Joe Santis testified at trial that he had learned that Hayden, Stone was not registered in Utah in December, 1969, or January, 1970, and that he informed

the respondent, Alex Markakis, of this fact sometime in January of 1970. [R.T. at p. 114.] Mrs. Piantes testified that her brother, Alex Markakis, did not inform her of this fact until March, 1970. [R.T. at p. 149.]

After the general market decline in March, 1970, respondents wrote letters on May 6, 1970, to Hayden, Stone tendering return of their stock, which had declined in value, and demanded return of their purchase money pursuant to Section 61-1-22 of the Utah Code. [Deft. Ex. No. 6, Pltf. Ex. C, and R.T. at p. 148]. Subsequently, on June 26, 1970, respondents Piantes wrote to petitioner in contradiction to their earlier letter and requested that Hayden Stone send to them the 200 shares of Blue Chip Stamps stock and the two shares of Royal Inns stock that were being held in their name.

At the time of respondents' transactions, petitioner was registered as a broker-dealer in the following 42 jurisdictions: Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. During that period petitioner was also a member of the National Association of Securities Dealers, the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange and the Philadelphia-Baltimore-Washington Stock Exchange.

The Seventh Judicial District Court of Utah ruled that it had personal jurisdiction over petitioner. [Markakis Tr. at p. 246.] The court found that petitioner, acting as a broker-dealer, had solicited the transactions in question in Utah while holding no license from the Utah Department of Business Regulations. [Piantes Tr. p. 45 and Markakis Tr. at p. 230.] The court held that the conduct was unlawful, that the plaintiff's transactions were voidable at respondents' option, and that each respondent could recover from petitioner the entire purchase price of every transaction he elected to void. The court made no finding that petitioner either intended not to register or was negligent in failing to register. There was no finding or evidence that petitioner's failure to register harmed respondents in any way. Nor was there a finding that, had petitioner filed an application and paid the $25.00 filing fee, it would not have been duly registered. On September 27, 1973, the Supreme Court of Utah, in a published opinion by Justice Ellett (514 P.2d 529), affirmed the judgment of the trial court.

Although the Constitutional questions raised by this petition were not raised below, this Court should nevertheless consider the case on its merits for several reasons.

The general rule that an appellate court will refuse to consider an argument not raised below is based upon the equitable notion that parties should have the opportunity to offer all evidence relevant to issues of fact. *Hormel v. Helvering*, 312 U.S. 552, 556, 85 L.Ed. 1037, 1041, 61 S.Ct. 719 (1940).

There are many exceptions to this rule. Justice Black, writing for a unanimous court in *Hormel v. Helvering*,

supra, 312 U.S. at 557, articulated the doctrine in the following terms:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. [citations.]
>
> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Because the questions presented are purely legal in nature, and do not contemplate any factual situation not relevant to the issues raised below, no prejudice will result to respondents by consideration of the questions for the first time by this Court.[2] Respondents were given ample opportunity to present their version of the transactions involved. No different facet of those transactions is made relevant by the questions presented here.

The common theme of the issues raised by this petition is that the penalty imposed by the Uniform Securities Act is unnecessary to enforce the registration

---

[2]This lack of prejudice to a respondent has been relied upon by the Supreme Court as the sole basis for hearing an argument for the first time on appeal. (*United States v. Continental Can Co.,* 378 U.S. 441, 457, 12 L.Ed.2d 953, 964, 84 S.Ct. 1738 (1964).)

requirements of that act and counteracts the policy of federal regulation of the securities industry. Certainly no evidence is necessary to demonstrate the effects of a statute permitting every customer of a broker-dealer to rescind selectively transactions made by him in a state where the broker-dealer had neglected or failed to secure a license.

There is an especially important reason for considering the preemption question raised by this petition. On December 4, 1973, after the judgment of the Utah Supreme Court, in *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. ..... (Dec. 4, 1973), this Court began to describe the boundaries of the preemption doctrine as it applies to state and federal regulation of the securities industry. The Court examined the purposes of the federal legislation in this area and concluded that New York Stock Exchange Rule 347, Promulgated pursuant to §6 of the Securities Exchange Act of 1934 (15 U.S.C. §78f), did not preempt state wage remedies of a brokerage house employee. The Court found that the state law involved should operate unimpaired since it did not thwart federal objectives in establishing securities exchange supervised self-regulation.

The state penalty applied to petitioner in this case, however, produces results in direct conflict with the policies of the federal statutory scheme. Because the teaching of the *Ware* decision was not available to petitioner in the courts below, petitioner should be permitted to raise the preemption doctrine in this Court. The commencement by this Court in *Ware* of an inquiry into federal-state relations in the securities field is an appropriate basis for considering petitioner's preemption argument. (See *Hormel v. Helvering, supra,*

312 U.S. at 558.)[3] Granting this petition will permit the Court to define further the interrelationship of federal and state laws dealing with the securities industry.

Finally, courts will also hear arguments for the first time on appeal when fundamental rights are involved. Thus, the Due Process Clause question, at least, should be considered by the Court, since due process has been explicitly declared to be a fundamental right sufficient to allow an issue to be argued for the first time on appeal. (*United Transportation U. v. Illinois Central Railroad Co.*, 433 F.2d 566, 571 (7th Cir., 1970); *Gomes v. Williams*, 420 F.2d 1364, 1367 (10th Cir., 1970).)

VI.

Reasons for Granting the Writ.

This Court should review the constitutionality of the unnecessarily harsh penalty imposed by Section 61-1-22 of the Utah Code Annotated because of the severity of its harmful effects upon the national economy. In *Ware*, the Court held that the resolution of wage disputes in the brokerage industry was outside the scope of federal concern. By contrast, the statute involved in this case regulates a field occupied by national legislation. If left unbalanced, the definitional process commenced in *Ware* could invite further state intrusion into areas of securities regulation preempted by Congress.

1. The pervasive federal regulatory scheme in the securities area was enacted in response to the 1929 crash of the stock market and the Great Depression

[3]The extreme importance of issues involving investor protection, standing alone, those issues for the first time on appeal. (*Green v. Brown*, 398 F.2d 1006, 1009 (2d Cir., 1968).

which followed. In enacting the Securities Act of 1933 (15 U.S.C. §77a-77aa) and the Securities Exchange Act of 1934 (15 U.S.C. §78a, *et seq.*), Congress recognized the importance of the securities industry and the securities exchange. "The great exchanges of this country upon which millions of dollars of securities are sold are affected with a public interest in the same degree as any other utility." H.R. Rep. No. 1383, 73d Cong., 2nd Sess. 15 (1934).

Section 2(1) of the Exchange Act (15 U.S.C. §78b) codifies the Congressional finding of the essential nature of the industry:

> "For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:
>
> (1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the officers, directors, and principal security holders,

> exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit."

It is evident from provisions of the Exchange Act that the purposes set forth in Section 2 are to be carried out in part by ensuring the financial stability of the brokerage industry. For example, Section 15A(b)(5) of the act (15 U.S.C. §78o-3(b)(5)), dealing with requirements for S.E.C. registration of associations of broker-dealers, reads in relevant part as follows:

> "An applicant association shall not be registered as a national securities association unless it appears to the Commission that—
>
> (5) the rules of the association provide that . . . no person shall become a member . . . unless such person is qualified to become a member . . . in conformity with specified and appropriate standards with respect to the training, experience, and such other qualifications of such person as the association finds necessary or desirable, and . . . *the financial responsibility of such member.*" (Emphasis added.)

Thus, while most of the membership qualifications are left to the discretion of the exchanges, Congress specifically mandated that broker-dealers be required

to meet standards of financial responsibility. The Securities and Exchange Commission has proposed implementation of the statute through a requirement that no broker or dealer permit his aggregate indebtedness to exceed 1500% of his net capital. (Proposed S.E.C. Rule 15c3-1, 17 C.F.R. 240.15c3-1.) That ratio has already been adopted by the New York Stock Exchange. (New York Stock Exchange Rule 325.) The operation of the Utah statute challenged by petitioner tends to undermine these regulations.

As the Government noted at pages 6 and 7 of its amicus curiae brief in the *Ware* case, the authority conferred upon the Securities and Exchange Commission by Section 19(b) of the Exchange Act (15 U.S.C. §78s(b)), to alter or supplement exchange rules on twelve specified subjects, impliedly authorizes the exchanges to adopt rules on the enumerated matters. Since the "Commission's powers of direct rule making . . . and its 'reserved' authority . . . provide the Commission with pervasive regulatory authority over and responsibility for the operations of exchange markets and the conduct of persons who use those markets", (*Security Industry Study*, Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, S.Doc. No. 93-13, 93d Cong., 1st Sess., p. 143), any state statute inconsistent with exchange or Commission regulation upon the twelve specified subjects of Section 19(b) must fall under the preemption doctrine. Significantly, the first item on the list of matters enumerated by Section 19 (b) reads: "safeguards in respect of the financial responsibility of [exchange] members and adequate provision against the evasion of financial responsibility

through the use of corporate forms or special partnerships. . . ." The unnecessarily severe statutory penalty of Utah, which impairs the net capital rule of the New York Stock Exchange and the proposed Commission rule on that subject, is therefore preempted by the federal regulation.

An examination of the federal securities acts reveals that all serve the common purpose of preserving and enhancing the important national economic functions performed by securities transactions, by encouraging the informed flow of capital to industries engaged in interstate commerce. The disclosure provisions of the Securities Act of 1933 foster this objective by protecting investors against fraudulent practices, thereby inspiring public confidence and participation in the capital markets of the United States. The Exchange Act promoted investor protection still further by extending the disclosure principle to securities listed on the national securities exchanges, and reiterating the prohibition against fraudulent or manipulative practices in any transaction in securities. The Securities Acts Amendments of 1964 applied the disclosure requirements of that Act to the over-the-counter market.

The Public Utility Holding Company Act of 1935 (15 U.S.C., §§79 to 79z-6), although designed to rectify problems found in a particular industry, evidences a continuing Congressional concern that private savings be marshaled for investment in interstate industry on a fair and equitable basis. The Trust Indenture Act of 1939 (15 U.S.C. §§77aaa-77bbbb) extended the registration requirements of the 1933 Act to debt securities, ensuring that independent trustees be appointed to protect and enforce the rights of investors.

The Investment Company Act of 1940 (11 U.S.C. §§72, 107; 15 U.S.C. 80a-1 to 80a-52) is based upon the Congressional finding that investment companies are affected with a national public interest. This act promotes investor confidence by such devices as regulating the custody of the companies' assets, requiring the disclosure of finances and investment policies of the companies, and prohibiting the companies from changing the nature of such policies without shareholder approval. A companion to the Investment Company Act is the Investment Advisers Act of 1940 (15 U.S.C. §§80b-1 to 80b-21), which requires registration of investment advisers and prohibits them from engaging in fraudulent, deceptive or manipulative practices.

The most recent legislation in the securities area, the Securities Investor Protection Act of 1970 (15 U.S.C. §78aaa, *et seq.*), establishes the Securities Investor Protection Corporation (SIPC), which administers a fund comprised of contributions from member brokerage houses. The fund is used to insure investors up to $50,000.00 against loss due to brokerage house failures, thereby increasing investor confidence and promoting the flow of investment capital.

The importance of the securities industry to the functioning of the national economy has been recognized by this Court. The Court in *Silver v. New York Stock Exchange,* 373 U.S. 341, 349-350, 10 L.Ed.2d 389, 395, 396, 83 S.Ct. 1246 (1963), outlined the vital nature of the securities industry in the following terms:

> "The need for statutory regulation of securities exchanges and the nature of the duty of self-regulation imposed by the Securities Exchange Act are properly understood in the context of a con-

sideration of both the economic role played by exchanges and the historical setting of the Act. Stock exchanges perform an important function in the economic life of this country. They serve, first of all, as an indispensable mechanism through which corporate securities can be bought and sold. To corporate enterprise such a market mechanism is a fundamental element in facilitating the successful marshaling of large aggregations of funds that would otherwise be extremely difficult of access. To the public the exchanges are an investment channel which promises ready convertibility of stock holdings into cash. The importance of these functions in dollar terms is vast . . . Moreover, because trading on the exchanges, in addition to establishing the price level of listed securities, affects securities prices in general, and because such transactions are often regarded as an indicator of our national economic health, the significance of the exchanges in our economy cannot be measured only in terms of the dollar volume of trading."

The 1968-1970 sharp stock market decline[4] brought to the store front the need for further national regulation of the securities industry. The necessity of ensuring the financial viability of brokerage houses was particularly emphasized by the high number of brokerage failures during this downturn. By 1971, over 100 member organizations had vanished from the New

[4]From the high in December, 1968, to the low in May, 1970, the Dow Jones average dropped 36 per cent, the New York Stock Exchange average dropped 54 per cent and the American Stock Exchange average dropped 63 per cent.

York Stock Exchange roster, and an unknown number of nonmember firms had also disappeared.[5]

The Securities Industry Study Report (see footnote 5) urged Congress to take further steps to promote the financial vitality of the brokerage industry. The reasons for this recommendation, given at page 38 of the report, stress the interdependency of brokerage firms:

> "First, the investing public must be protected against the consequences of brokerage failure. The Subcommittee believes that the SIPC legislation is a significant step in this direction. There may be some imperfections in the SIPC legislation, however, and the Subcommittee will address them as soon as sufficient experience has been gained under the statute.
>
> "Second, the consequences of brokerage failure should be confined as nearly as possible to the individual firm and not be allowed to permeate the entire brokerage industry or to have a significant detrimental effect upon the nation's economy. As Robert W. Haack, former President of the New York Stock Exchange, said in a letter of May 25, 1970 to the Director of the Commission's Division of Trading and Markets:
>
> '. . . there is a high degree of interdependence among members of the Exchange community which results from the contractual relationship among the Exchange, Stock Clearing Corporation and Members and Member Organizations. Not only must the Exchange be concerned with

[5]Security Industry Study, Report of the Subcommittee of the Senate Committee on Banking, Housing and certain Affairs, S. Doc. No. 93-13, 93rd Cong., 1st Sess., p. 29.

> the solvency and liquidity of individual members but it must also be concerned with the overall liquidity of the marketplace. Reasonable administration of rule 325 demands due consideration of the impact of remedial action with respect to one member organization upon the wider circle of other brokers and their customers, etc.'
>
> "Without accepting or rejecting the conclusions stated in Mr. Haack's letter, his observation of a possible domino effect of the failure of one or more brokerage houses is noteworthy. *For, in the ordinary course of their business, brokers and dealers become debtors or creditors of, and deposit funds and securities with, one another and with various clearing corporations and securities depositories. When one broker's account with another firm is placed in jeopardy due to insolvency, it is entirely possible that both firms will fail. The possibility of cumulative effects in such a situation is a matter of serious concern.*" (Emphasis added.)

2. The effect of Section 61-1-22 of the Utah Code Annotated, under which petitioner was found liable, conflicts with the purposes of the federal legislation discussed above. This section, as interpreted by the Supreme Court of Utah, allows every purchaser of securities to rescind any or all purchases at his option which were made through a broker-dealer who failed to obtain a state license. The statute holds the broker liable for all losses without any set-off for gains. The broker is strictly liable—there is no requirement that the court find negligence, let alone intent. Nor is there any requirement that the broker's failure to register be the cause of the purchaser's loss.

The punishment imposed by the statute bears no rational relationship to its intended function, which is to enforce Utah's licensing requirement. The penalty depends upon market conditions and the dollar amount of the transactions involved. If, for example, a license application were misplaced in a populous state, such as New Jersey or Michigan, which have also adopted the Uniform Securities Act, damages could reach many millions of dollars in a down market. In addition, the penalty provision is subject to abuse by a customer, who can take a "free ride" by purchasing or retaining securities purchased from a broker-dealer the customer knows is not licensed. Thus, plaintiffs in this case rescinded in May of 1970, the month in which the market reached its low. Respondent Markakis learned that petitioner was not licensed five months prior to that time. The transactions plaintiffs had executed with petitioner before the market decline, were, of course, not rescinded, since those transactions were profitable to them.

Thus, the effect of this section is to provide no penalty at all in an up market but to provide devastating punishment at the worst possible time for the national economy—when a severe bear market is restricting the flow of capital into the equities markets. It thereby accentuates the impact of downward fluctuations of the market. This effect runs directly contrary to the objective of the Securities Exchange Act of 1934, as articulated by Sections 2(3) and 2(4) of that act:

> "(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, *resulting in sudden and unreasonable fluctuations in the*

price of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

"(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and *sudden and unreasonable fluctuations of security prices* and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit." (Emphasis added.)

Petitioner does not question Utah's right to require brokerage houses to obtain state licenses. Nor does petitioner complain of the $25.00 filing fee charged by the Utah Department of Business Relations. Petitioner contends only that the penalty imposed for failure to comply unduly interferes with the objectives of federal securities regulation, and is unnecessary to enforce the Utah licensing requirement. The situation is analogous to that involved in *Hill v. Florida,* 325 U.S. 538, 89 L.Ed. 1782, 65 S.Ct. 588 (1944). In *Hill* the Court held that federal labor legislation preempted the pen-

alty provision of a Florida statute requiring licensing of labor unions. In discussing the statute, the Court made clear it was the enforcement provision only which rendered the law invalid:

> "The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. *It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining.*" 325 U.S. at 543. (Emphasis added.)

As was pointed out at pages 3 and 4 of the Brief the United States as Amicus Curiae in the case of *Merrill Lynch, Pierce, Fenner & Smith v. Ware, supra.*

> "A finding of preemption may be dictated by the nature of the regulated subject, . . . [*Florida Line & Avocado Grower, Inc. v. Paul,* 373 U.S. 132, 142], by the existence of a pervasive and comprehensive scheme of federal regulation that 'requires a uniform and exclusive system of federal regulation' to fulfill the federal statutory purposes, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639, or by the presence of such a conflict with the federal statute or the federal regulatory scheme that application of the state law would frustrate the purpose of the federal law. *Colorado Anti-Distrimination Comm'n v.*

Continental Air Lines, Inc., 372 U.S. 714, 724; *Rice v. Chicago Board of Trade*, 331 U.S. 247, 253-255."

Petitioner relies upon the third basis of preemption discussed by the Government's brief. The conflict between the purpose of the federal securities regulatory scheme and Utah's unnecessarily excessive penalty causes the state statute to be preempted. The fact that Utah may not have intended to thwart federal policy by enacting Section 410 of the Uniform Securities Act is not relevant to the issue of preemption. (*Perez v. Campbell*, 402 U.S. 637, 651-652, 29 L.Ed. 2d 233, 243, 91 S.Ct. 1704 (1971).)

The statutory remedy does not appear necessary to serve any state interest. Compensation of the customer could not be its purpose since recovery is not dependent upon causation. There is no reason for a broker-dealer to indemnify its customers against all losses over which it had no control and which it did not cause. The remedy is calculated to enforce the licensing requirement in the crudest of ways. It is most effective in a bear market, and imposes excessive liability without fault. The harmful effects envisioned by this petition are not unlikely. Utah is not the only state requiring broker-dealers to obtain a license. Petitioner, at the time this suit arose, was registered in 41 states and Washington, D.C., and was a member of the National Association of Securities Dealers and seven stock exchanges. The thicket of regulation by these jurisdictions and associations, as well as the federal government, requires of broker-dealers a tremendous amount of paper work with its inevitable potential mistakes.

VII.

Conclusion.

Petitioner urges the Court to grant a writ of certiorari in this proceeding. Petitioner also respectfully requests that the Court invite the Solicitor General to express the views of the United States in the case.

Respectfully submitted,

WALTER S. WEISS,
Counsel for Petitioner.

APPENDIX A.

Findings of Fact and Conclusions of Law.

In the Seventh Judicial District Court in and for the County of Carbon, State of Utah.

Alex N. Markakis, Plaintiff, vs. Hayden-Stone, Incorporated, a Delaware corporation, Defendant. Civil No. 9776.

The above-entitled cause came on regularly for trial on the 1st day of August, 1972 before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiff, and Arthur H. Nielsen appearing as counsel for the defendant; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, the following Findings of Fact and Conclusions of Law constituting the decision of the Court in said action are hereby made:

FINDINGS OF FACT

1. That plaintiff is a resident of Carbon County, State of Utah.

2. That defendant is a Delaware corporation not qualified to do business in the State of Utah as a foreign corporation.

3. That defendant's principal business during the period October 1, 1968 through December 31, 1969 was that of broker-dealer; that during such period defendant did engage in the business of effecting transactions in securities for the account of others and did engage in the business of buying and selling securities for its own account as part of its regular business.

4. That during the period January 1, 1969 through December 31, 1969, defendant was registered and licensed as a broker-dealer in the States of Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming; during such period defendant was a member of the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Stock Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange, the Philadelphia-Baltimore-Washington Stock Exchange.

5. That during the period October 1, 1968 to December 31, 1969, defendant maintained an office at 100 West "C" Street, San Diego, California.

6. That during the period October 1, 1968 through December 31, 1969, defendant was not licensed and registered as a broker-dealer by the Utah Department of Business Regulation, Securities Division.

7. That on October 27, 1969, plaintiff purchased from defendant, acting as agent, 1000 shares of Occidental Petroleum Corporation preferred stock at a cost of $43,656.30; that on October 28, 1969, plaintiff purchased from defendant, acting as principal, 1000 shares of King Resources Company common stock at a cost of $28,875.00; that on December 18, 1969, plaintiff purchased from defendant, acting as agent, 1000 shares of Royal Inns of America common stock at a cost of $28,330.00.

8. That at no time has plaintiff been an officer, director, agent, or employee of defendant corporation.

9. That during the period January 1, 1969 to December 31, 1969, defendant did solicit plaintiff to purchase or sell securities from or through defendant, which solicitations involved at least 35 telephone calls originating at defendant's San Diego, California office and directed to plaintiff at his home or place of business in Price, Utah; that at least 8 additional solicitations occurred in Price, Utah during personal conversations between plaintiff and defendant's agent, employee and registered representative.

10. That at the time of such solicitations by defendant of plaintiff to engage in buy or sell securities transactions, plaintiff had no knowledge that defendant was not duly licensed or registered as a broker-dealer by the State of Utah.

11. That during the period January 1, 1969 through December 31, 1969, defendant did direct more than 15 offers to sell or buy into this state to persons other than banks, savings institutions, trust companies, insurance companies, investment companies (as defined in the Investment Company Act of 1940), pension or profit-sharing trusts, other broker-dealers, other financial institutions or institutional buyers, whether acting for themselves or as trustees, or with or through the issuers of the securities involved in the transactions; that during such period defendant did direct at least 86 solicitations of offers to sell or buy securities into this state to persons residing in and present in this state, other than those referred to in this paragraph above.

12. That on May 27, 1970, plaintiff, by and through his counsel, did tender in writing to defendant

the securities referred to in paragraph 7 above, and did demand a return of the purchase price thereof; that subsequent thereto, defendant rejected plaintiff's tender; that plaintiff did tender prior to judgment and deposit in court the securities referred to in paragraph 7 above.

13. That since the date of purchase by plaintiff of securities of Royal Inns of America, plaintiff has received a stock dividend of 102 shares, which shares have been tendered by plaintiff and deposited in court; that since the date of purchase by plaintiff of the securities of Occidental Petroleum Corporation, plaintiff has received dividends totaling $5,940.00, which dividends were paid quarterly and consist of 11 quarterly dividends of $540.00 each.

14. That the parties have stipulated that the plaintiff has expended costs in this action in an amount of $160.10.

15. That plaintiff's attorney expended approximately 150 hours in connection with the prosecution of this action. That a reasonable attorney's fee to be awarded plaintiff is the amount of $8,000.00.

From the foregoing Findings of Fact, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the person of defendant and the subject matter of this action.

2. That defendant has transacted business in this state in the capacity and function of a broker-dealer.

3. That defendant is subject to the licensing and registration requirements of the Utah Uniform Securities Act; that the number of solicitations of brokerage transactions by defendant directed into this state exceeded by 71 that number of offers to buy or sell

securities exempt under the provisions of the Utah Uniform Securities Act.

4. That the conducting of business in the State of Utah by defendant during the period was unlawful; that the solicitations of brokerage transactions by defendant directed into this state were unlawful; that the securities transactions of plaintiff with defendant, the subject of this action, are voidable at the election of plaintiff.

5. That plaintiff is not in pari delicto with defendant; that plaintiff has not waived any claims or rights he has against defendant, nor is plaintiff guilty of laches or estoppel or barred from maintaining this action.

6. That plaintiff made good and valid tender of the securities involved in this action. That defendant is entitled to possession of certificates representing the securities the subject of this action, together with any dividends received thereon subsequent to August 2, 1972, upon satisfaction of plaintiff's judgment against said defendant.

7. That plaintiff is entitled to rescind the transactions wherein plaintiff purchased securities of King Resources Company, Royal Inns of America and Occidental Petroleum Corporation and recover his purchase price thereof, plus interest from the dates of purchase, costs of court and reasonable attorney's fees, less dividends received, and that plaintiff is entitled to a judgment against defendant in such amounts.

DATED this 25 day of October, 1972.

BY THE COURT:

Henry Ruggeri
District Court Judge

APPENDIX B.

Findings of Fact and Conclusions of Law.

In the Seventh Judicial District Court in and for, Carbon County, State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs, vs. Hayden-Stone, Inc., a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants. Civil No. 9987.

The above-entitled cause came on regularly for trial on the 1st day of August, 1972 before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiffs, and Arthur H. Nielsen appearing as counsel for the defendants; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, the following Findings of Fact and Conclusions of Law constituting the decision of the Court in said action are hereby made:

FINDINGS OF FACT

1. That plaintiffs are residents of Carbon County, State of Utah.

2. That defendant Hayden-Stone, Inc. is a Delaware corporation not qualified to do business in the State of Utah as a foreign corporation.

3. That defendant Hayden-Stone, Inc.'s principal business during the period October 1, 1968 through December 31, 1969 was that of broker-dealer, that during such period said defendant did engage in the business of effecting transactions in securities for the account of others and did engage in the business of

buying and selling securities for its own account as part of its regular business.

4. That during the period January 1, 1969 through December 31, 1969, defendant Hayden-Stone, Inc. was registered and licensed as a broker-dealer in the States of Alabama. Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming; during such period said defendant was a member of the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Stock Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange, the Philadelphia-Baltimore-Washington Stock Exchange.

5. That during the period October 1, 1968 to December 31, 1969, defendant Hayden-Stone, Inc. maintained an office at 100 West "C" Street, San Diego, California.

6. That during the period October 1, 1968 through December 31, 1969, defendant Hayden-Stone, Inc. was not licensed and registered as a broker-dealer by the Utah Department of Business Regulation, Securities Division.

7. That on the 19th day of November, 1969. plaintiffs purchased through the San Diego, California office of defendant Hayden-Stone, Inc. 200 shares of Blue Chip Stamps common stock at a price of $21.50

per share, for a total purchase price of $4,300.00, which securities were purchased from said defendant acting as principal.

8. That at no time have either of the plaintiffs been an officer, director, agent or employee of either of the defendant corporations.

9. That H-S Equities is a corporation, the successor of defendant.

10. That during the period November 20, 1968 to November 26, 1969, defendants did solicit plaintiffs to purchase or sell securities from or through defendants, which solicitations involved at least 18 telephone calls originating at defendants' San Diego, California office and directed to plaintiffs at their home or the place of business of the plaintiff Mary Piantes in Price, Utah; that at least 4 additional solicitations occurred in Price, Utah during personal conversations between plaintiffs and defendants' agent, employee and registered representative.

11. That at the time of such solicitations by defendants of plaintiffs to engage in buy or sell securities transactions, plaintiffs had no knowledge that defendants were not duly licensed or registered as broker-dealers by the State of Utah.

12. That during the period November 20, 1968 through November 19, 1969, defendants did direct more than 15 offers to sell or buy into this state to persons other than banks, savings institutions, trust companies, insurance companies, investment companies (as defined in the Investment Company Act of 1940), pension or profit-sharing trusts, other broker-dealers, other financial institutions or institutional buyers, whether acting for themselves or as trustees, or with or

through the issuers of the securities involved in the transactions; that during such period defendants did direct at least 86 solicitations of offers to sell or buy securities into this state to persons residing in and present in this state, other than those referred to in this paragraph above.

13. That on May 6, 1970 and October 5, 1971, plaintiffs did tender in writing to defendants the securities referred to in paragraph 7 above, and did demand a return of the purchase price thereof; that plaintiffs' tender was rejected by defendants; that plaintiffs did tender prior to judgment and deposit with the court the securities referred to in paragraph 7 above.

14. That since the date of purchase by plaintiffs of the securities of Blue Chip Stamps, plaintiffs have received a cash dividend totaling $20.00.

15. That the parties have stipulated that the plaintiffs have expended costs in this action in an amount of $30.04.

16. That plaintiffs' attorney has expended approximately 60 hours in the prosecution of this case. That a reasonable attorney's fee to be awarded plaintiffs for the prosecution of this action is the amount of $2,000.00.

From the foregoing Findings of Fact, the Court now makes and enters its

CONCLUSIONS OF LAW

1. That this Court has jurisdiction over the person of defendants and the subject matter of this action.

2. That defendants have transacted business in this state in the capacity and function of a broker-dealer.

3. That defendants are subject to the licensing and registration requirements of the Utah Uniform Securities Act; that the number of solicitations of brokerage transactions by defendants directed into this state exceeded by 71 that number of offers to buy or sell securities exempt under the provisions of the Utah Uniform Securities Act.

4. That the conducting of business in the State of Utah by defendants during the period was unlawful; that the solicitations of brokerage transactions by defendants directed into this state were unlawful; that the securities transactions of plaintiffs with defendant, the subject of this action, are voidable at the election of plaintiffs.

5. That plaintiffs are not in pari delicto with defendants; that plaintiffs have not waived any claims or rights they have against defendants, nor are plaintiffs guilty of laches or estoppel or barred from maintaining this action.

6. That plaintiffs made good and valid tender of the securities involved in this action. That defendants are entitled to possession of the certificates representing the securities the subject of this action, together with any dividends received thereon subsequent to August 2, 1972, upon satisfaction of plaintiffs' judgment against said defendants.

7. That plaintiffs are entitled to rescind the transaction wherein they purchased securities of Blue Chip Stamps and recover their purchase price thereof, plus

interest from the date of purchase, costs of court and reasonable attorney's fees and less dividends received; and that plaintiffs are entitled to a judgment against defendant Hayden-Stone, Inc. in such amounts.

DATED this 25 day of October, 1972.

BY THE COURT:
Henry Ruggeri
District Court Judge

Amendment to Findings of Fact and Conclusions of Law.

In the Seventh Judicial District Court in and for Carbon County, State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs, vs. Hayden-Stone, Inc., a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants. Civil No. 9987.

The above-entitled matter came on regularly for hearing before The Honorable Henry Ruggeri on the 6th day of November, 1972, pursuant to defendants' objections to and motion to amend Findings of Fact, Conclusions of Law and Judgment; the parties not appearing in person but being represented by their respective counsel of record, Warren M. Weggeland for the plaintiffs and Arthur H. Nielsen for the defendants; whereupon the Court heard arguments of counsel and being fully advised in the premises now makes and enters the following amendment to the Findings of Fact and Conclusions of Law heretofore entered by this Court in the above-entitled action on the 25th day of October, 1972.

FINDINGS OF FACT

1. That paragraph 1 of the Findings of Fact is herewith amended as follows:

> 1. That plaintiffs are residents of Carbon County, State of Utah. That defendant Hayden-Stone, Inc. is a Delaware corporation not qualified to do business in the State of Utah as a foreign corporation.

2. That paragraph 2 of the Findings of Fact is herewith amended as follows:

> 2. That service of process was obtained against said defendants by having Terry Rossiter, deputy constable, First Precinct, Salt Lake County, State of Utah, serve copies of Summons and Complaint on William E. Sargeant, director, Utah State Securities Commission, as required by Utah Code Ann. §61-1-26(7). That on the 13th day of January, 1972, Notice of Service of Process was deposited with the United States mail by counsel for plaintiffs and mailed to defendants herein, together with a copy of the Summons, Complaint and Return of Service, which pleadings and documents were mailed by registered mail to defendant H-S Equities, Inc. at 79 Pine Street, New York, New York; defendant Hayden-Stone, Inc. at 110 West "C" Street, San Diego, California; defendant Hayden-Stone, Inc. in care of Corporation Trust Company, 100 West Tenth Street, Wilmington, Delaware; and Hayden-Stone, Inc. at 25 Broad Street, New York, New York, as required by Utah Code Ann. §61-1-26(7). Further, that there was filed with the clerk of this court on or about the 17th day of January, 1972, plaintiffs' Affidavit of Compliance as required by Utah Code Ann. §61-1-26(7).

From the Findings of Fact as heretofore entered and the foregoing amendment to Findings of Fact, the Court now makes and enters the following amendment to Conclusions of Law:

CONCLUSIONS OF LAW

1. There shall be added to the Conclusions of Law heretofore entered by this Court in the above-entitled action an additional paragraph numbered 8, as follows:

> 8. That defendants are entitled to an order requiring plaintiffs to deposit with the clerk of this court any and all dividends received by plaintiff on the securities the subject of this action from and after the 2d day of August, 1972.

DATED this 9th day of November, 1972.

BY THE COURT:

Henry Ruggeri, District Judge

APPENDIX C.

Amended Judgment.

In the Seventh Judicial District Court in and for the County of Carbon, State of Utah.

Alex N. Markakis, Plaintiff, vs. Hayden-Stone Incorporated, a Delaware corporation, Defendant. Civil No. 9776.

The above-entitled matter came on regularly for trial on the 1st day of August, 1972, before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiff, and Arthur H. Nielsen appearing as counsel for the defendant; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, and the Court, having heretofore made and entered its Findings of Fact and Conclusions of Law, and having made and entered an Amendment to its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff is awarded a judgment against defendant as follows:

1. For the purchase price of the securities involved, plus interest, less applicable dividends received, as follows:

A. For an amount of $43,656.30 representing the purchase price of Occidental Petroleum Corporation preferred stock, plus interest thereon from the date of payment, less dividends received, for total interest of $1,823.60; for a total amount of $45,479.90.

B. For an amount of $28,330.00 representing the purchase price of Royal Inns of America common

stock, plus interest thereon from the date of payment in an amount of $4,816.10; for a total amount of $33,146.10.

C. For an amount of $28,875.00 representing the purchase price of King Resources Company common stock, plus interest thereon from the date of payment in an amount of $5,149.40; for a total amount of $34,024.40.

2. For plaintiff's costs incurred in the amount of $160.10.

3. For attorney's fees in an amount of $8,000.00.

4. For a total judgment against defendant of $100,861.30, interest of $11,789.10, costs of $160.10 and attorney's fees in the amount of $8,000.00, which amount totals $120,810.50, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon entry of satisfaction of judgment, defendant is entitled to possession and title to the stock certificates representing 1,000 shares of Occidental Petroleum Corporation preferred stock; 1,000 shares of King Resources Company common stock; and 1,000 shares of Royal Inns of America common stock, plus 102 shares of Royal Inns of America common stock received by plaintiff as a stock dividend, together with all dividends accrued or paid thereon from and after August 2, 1972, and plaintiff is herewith ordered to deposit with the clerk of this court any and all dividends received from and after August 2, 1972.

DATED this 9th day of November, 1972.

BY THE COURT:
Henry Ruggeri, District Judge

APPENDIX D.

Amended Judgment.

In the Seventh Judicial District Court in and for the County of Carbon, State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs, vs. Hayden-Stone, Inc., a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants. Civil No. 9987.

The above-entitled matter came on regularly for trial on the 1st day of August, 1972, before the Court sitting without a jury; Warren M. Weggeland appearing as counsel for the plaintiffs, and Arthur H. Nielsen appearing as counsel for the defendants; and the Court having heard the testimony and having examined the proofs offered by the respective parties, and having heard arguments of counsel, and being fully advised in the premises, and the Court, having heretofore made and entered its Findings of Fact and Conclusions of Law, and having made and entered an Amendment to its Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded a judgment against defendant Hayden-Stone, Inc. as follows:

For an amount of $4,300.00 representing the purchase price of Blue Chip Stamps common stock, plus interest thereon from the date of payment in an amount of $732.50, plus costs of court in an amount of $30.04, and for attorney's fees in an amount of $2,000.00, for a total judgment against defendant of $7,062.54, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon entry of satisfaction of judgment, defendants are entitled to possession and title to the stock certificates representing an aggregate of 200 shares of Blue Chip Stamps common stock, together with all dividends accrued or paid thereon from and after August 2, 1972, and plaintiffs are herewith ordered to deposit with the clerk of this court any and all dividends received from and after August 2, 1972.

DATED this 9th day of November, 1972.

BY THE COURT:

Henry Ruggeri, District Judge

APPENDIX E.

In the Supreme Court of the State of Utah.

Gus T. Piantes and Mary M. Piantes, his wife, Plaintiffs and Respondents, v. Hayden-Stone, Inc. a Delaware corporation, and H-S Equities, Inc., a corporation, Defendants and Appellants. No. 13143.

Alex N. Markakis, Plaintiff and Respondent, v. Hayden-Stone, Incorporated, a Delaware corporation, Defendant and Appellant. No. 13144.

Filed: September 27, 1973.

ELLETT, Justice:

This is an action by plaintiffs to recover the consideration paid to Hayden-Stone, Inc., hereinafter called the defendant, for certain securities which defendant sold to them.[1]

The defendant as a broker-dealer is registered in some 41 states of the Union, although not in Utah. Its office is located in San Diego, California. It claims it did no business in Utah and that it is immune from suit here. It also contends that if a rescission of any stock transaction is permitted, all transactions must be rescinded.

Our statute[2] requires a broker-dealer or agent to be registered before it can transact business in this state and further provides that a purchaser of securities from an unlicensed broker may sue to recover the purchase price, etc.[3] The statute further provides that a broker-dealer is not to be held as engaging in busi-

---

[1]Appellant H-S Equities, Inc., is a successor in interest to appellant Hayden-Stone, Inc.

[2]Section 61-1-3, U.C.A. 1953 (Replacement Vol. 7A).

[3]Section 61-1-22, U.C.A. 1953 (Replacement Vol. 7A).

ness during any period of twelve consecutive months if it does not direct more than 15 offers to sell or buy to persons located in Utah during that time.

On believable evidence the trial court found that in the year 1969 when the purchases complained of were made, the defendant made not less than 35 telephone calls from its office in San Diego, California, to the plaintiffs, soliciting the buying or selling of securities, and that defendant's agent made at least eight personal solicitations in Utah. The court further found that during the year 1969 the defendant made at least 86 solicitations to buy or sell securities to other people in Utah.

In regard to defendant's claim that it is immune from suit here, it should be noticed that two actions were consolidated for trial and for appeal. In the Piantes case jurisdiction was obtained pursuant to the provisions of Section 61-1-26(7) of the Utah Uniform Securities Act. In the Markakis case jurisdiction was obtained under Section 78-27-22, U.C.A. 1953, as amended, known as the long arm statute, which permits jurisdiction over nonresidents who through significant minimal contacts within this state incur obligations to citizens thereof. These minimal contacts are set forth in the statute.

The question to be considered is this: Is the manner of obtaining jurisdiction over one in violation of the Securities Act, as set out in Section 61-1-26(7), U.C.A. 1953, the exclusive method of acquiring jurisdiction?

The section by its language does not purport to be the exclusive means of acquiring jurisdiction, as it plainly states, "When . . . personal jurisdiciton over him cannot otherwise be obtained," etc. The section simply gives a special means of bringing into court one

who violates the Securities Act. It does not prevent the obtaining of personal jurisdiction by any other means provided by statute. If it did so, personal service in this state, if it could be obtained, would not be proper although the statute says that the service provided for is equivalent to personal service.

We hold that the trial court had jurisdiction over the defendant to make the judgment rendered.

In support of its contention that if a rescission of any stock transaction is permitted, all transactions must be rescinded and that the lower court erred in permitting plaintiffs to void selected transactions rather than treating the transactions and relationships as a whole, defendant cites the case of Mellott v. Love,[4] which says, ". . . [T]he disaffirmance of a contract made by an infant nullifies it and renders it void ab initio, and all parties are restored to the status in which they would have been if the contract had never been made." However, that case is not applicable to the instant matter because our statute does not require a purchaser of securities from an unregistered broker to set aside all transactions but permits rescission of any purchase which the purchaser chooses to make. The protection afforded to a purchaser is for his benefit and is at his option. He need not rescind any transaction unless he chooses to do so. The option is his and his alone.

The judgment of the trial court is affirmed. Costs are awarded to the respondents.

E. R. Callister, Jr., *Chief Justice*
F. Henri Henriod, *Justice*
J. Allan Crockett, *Justice*
R. L. Tuckett, *Justice*

---

[4]Mellott v. Love, 119 So. 913 (Miss. 1929).

APPENDIX F.

United States Constitution, Article VI, Section 2.

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
United States Constitution, Fourteenth Amendment, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 61-1-3, Utah Code Annotated.

"(1) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless he is registered under this act.

"(2) It is unlawful for any broker-dealer or issuer to employ an agent unless the agent is registered. The registration of an agent is not effective during any period when he is not associated with the particular broker-dealer registered under this act or a particular issuer. When an agent begins or terminates a connection with a broker-dealer or issuer, or begins or terminates those activities which make him an agent, the

agent as well as the broker-dealer or issuer shall promptly notify the commission.

"(3) It is unlawful for any person to transact business in this state as an investment adviser unless he is so registered under this act or he is registered as a broker-dealer without the imposition of a condition under section 61-1-6(3)(e), or his only clients in this state are investment companies as defined in the Investment Company Act of 1940 or insurance companies."

Section 61-1-22, Utah Code Annotated.

"(1) Any person who (a) offers or sells a security in violation of section 61-1-3(1), 61-1-7, or 61-1-17 (2) or of any rule or order under section 61-1-15 which requires the affirmative approval of sales literature before it is used, or of any condition imposed under section 61-1-10(4), 61-1-11(7), or (b) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security. Damages are the amount that

would be recoverable upon a tender less the value of the security, when the buyer disposed of it and interest at six per cent per year from the date of disposition.

"(2) Every person who directly or indirectly controls a seller liable under subsection (1), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the nonseller who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable;

"(3) Any tender specified in this section may be made at any time before entry of judgment.

"(4) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

"(5) No person may sue under this section more than two years after the contract of sale. No person may sue under this section (i) if the buyer reviewed [received] a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six per cent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty days of its receipt.

"(6) No person who has made or engaged in the performance of any contract in violation of any provision of this act or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

"(7) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act or any rule or order hereunder is void.

"(8) The rights and remedies provided by this act are in addition to any other rights or remedies that may exist at law or in equity, but this act does not create any cause of action not specified in this section or section 61-1-4(5)."

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1009

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,
Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,
Respondents.

HAYDEN, STONE INCORPORATED,
a Delaware Corporation,
Petitioner,

vs.

ALEX M. MARKAKIS,
Respondent.

On Petition For a Writ of Certiorari
to the
Supreme Court of the State of Utah

RESPONDENTS' BRIEF IN OPPOSITION

Warren M. Weggeland
692 Kennecott Building
Ten East South Temple
Salt Lake City, Utah 84133

Counsel for Respondents

INDEX

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement 2

Reasons For Denying Writ

I. The Untimely Filing of the Petition Deprives This Court of Jurisdiction Over the Case 6

II. Petitioner Failed to Raise the Federal Question in the Courts Below 7

III. There Exists no Federal Question 8

IV. There is No Federal Pre-emption of State Regulation of the Securities Industry 9

Conclusion 12

CITATIONS

Cases:

Black v. Cutter Laboratories, 351 U.S. 292, 100 L. Ed. 1188, 76 S. Ct. 824 (1956) 9

Caldwell v. Sioux Falls Stockyards Co., 242 U.S. 359, 61 L. Ed. 480, 37 S. Ct. 217 (1917) 11

Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969) 7-8

Crosby v. Weill, 328 Ill. 538, 48 N.E. 2d 389 (1943) 10

Dep't. of Banking v. Pink, 317 U.S. 264, 87 L. Ed. 254, 63 S. Ct. 233 (1942) 6

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) 11

Hall v. Geiger-Jones Co., 242 U.S. 359, 61 L. Ed. 480, 37 S. Ct. 217 (1917) 11

Herb v. Pitcairn, 324 U.S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945) 9

Johnson v. Thornburg, 276 U.S. 601, 72 L. Ed. 725, 48 S. Ct. 322(1928) 9

Merrick v. N. W. Halsey & Co., 242 U.S. 568, 61 L. Ed. 498, 37 S. Ct. 227 (1917) 11

Merrill Lynch, Pierce, Fenner & Smith v. Ware, ... U.S. ...., 38 L. Ed. 2d 348, 94 S. Ct. .... (1973) 11-12

Monks v. New Jersey, 398 U.S. 71, 26 L. Ed. 2d 54, 90 S. Ct. 1563 (1970) 8

Safeway Stores, Inc. v. Oklahoma Retail Grocers Assoc., 360 U.S. 334, 3 L. Ed. 2d 1280, 79 S. Ct. 1196 (1959).... 8

Schacht v. United States, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970) 7

State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154, 89 L. Ed. 812, 65 S. Ct. 753 (1945) 8

Teague v. Comm'r. of Customs, 394 U.S. 977, 22 L. Ed. 2d 756, 89 S. Ct. 1457 (1969) *rehearing denied*, 395 U. S. 930, 23 L. Ed. 2d 251, 89 S. Ct. 1768 (1969) 6-7

Travelers Health Assoc. v. Commonwealth of Virginia, ex rel., State Corp. Comm'n., 339 U.S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1950) 11

Wilson v. Loew's, Inc., 355 U.S. 597, 2 L. Ed. 2d 519, 78 S. Ct. 526 (1958) 9

Statutes:

Investment Advisers Act of 1940, Section 222 (15 U.S.C. §80b-18a) 10

Investment Company Act of 1940, Section 50 (15 U.S.C. §80a-49) 10

Public Utility Holding Company Act of 1935, Section 21 (15 U.S.C. §79u) 10

Securities Act of 1933, Section 18 (15 U.S.C. §77r) 2, 10

Securities Exchange Act of 1934, Section 28(a) (15 U.S.C. §78bb) 2, 10

Trust Indenture Act of 1939, Section 326 (15 U.S.C. §77zzz) 10

United States Constitution
Article VI, Section 2 2
Fourteenth Amendment, Section 1..... 2, 11

28 U.S.C. §1257(3) 7, 8, 9

28 U.S.C. §2101(c) 6

Utah Uniform Securities Act
Section 3 (§61-1-3, Utah Code Ann. 1953) 2
Section 22 (§61-1-22(1), Utah Code Ann. 1953) 2, 5, 8
Section 26(7) §61-1-26(7), Utah Code Ann. 1953) 8

Utah Code Annotated, §78-27-22 (1953) 8

Rules:

Rule 23(1)(f), Supreme Court Rules 7

Miscellaneous:

1 Loss, *Securities Regulation*, (2d Ed. 1961, Supp. 1969).... 11

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1009

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,
Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,
Respondents.

HAYDEN, STONE INCORPORATED,
a Delaware Corporation,
Petitioner,

vs.

ALEX M. MARKAKIS,
Respondent.

On Petition For a Writ of Certiorari
to the
Supreme Court of the State of Utah

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in Appendices A-E of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Has the scheme of Federal regulation pre-empted state regulation of the securities industry, including regulation of broker-dealers operating within the state and the licensing and supervision thereof?

2. Does the remedy of recission afforded a buyer against a broker-dealer failing to comply with the licensing requirements of a state unreasonably burden interstate commerce or violate the Due Process Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Section 2, of the United States Constitution; Section 1 of the Fourteenth Amendment to the Constitution; Sections 61-1-3 and 61-1-22, Utah Code Ann. (1953) are set forth in Appendix F to the Petition. Pertinent portions of Section 18 of the Securities Act of 1933 (15 U.S.C. §77r) and Section 28(a) of the Securities Exchange Act of 1934 (15 U.S.C. §78bb) are set forth in the body of this Brief in Opposition.

STATEMENT

Respondents agree generally with the Statement contained in petitioners' Petition for Writ of Certiorari. However, respondents submit that the following is a more accurate presentation of the material facts of the case.

Petitioner Hayden-Stone, Inc., a Delaware corporation, is a broker-dealer firm engaged in the business of effecting transactions in securities for its own account and for the account of others as part of its regular business activity (App. A, p. 2 of Petition). Petitioner HS Equities, Inc. is the successor of Hayden-Stone, Inc. (App. B, pp. 6, 8 of Petition). Mention herein to petitioner or

petitioners refers to Hayden-Stone, Inc., unless the context indicates otherwise.

During the period January 1, 1969 through December 31, 1969, petitioner Hayden-Stone, Inc. was registered and licensed as a broker-dealer in 41 states, the District of Columbia, and was a member of the New York Stock Exchange, the American Stock Exchange, the Pacific Coast Stock Exchange, the Midwest Stock Exchange, the Boston Stock Exchange, the Cincinnati Stock Exchange, and the Philadelphia - Baltimore - Washington Stock Exchange. During such period it maintained an office at 110 West "C" Street, San Diego, California, and maintained other offices throughout the nation. Also during such period, petitioner was not licensed and registered as a broker-dealer by the Utah Department of Business Regulation nor was it qualified to do business within the State of Utah as a foreign corporation (App. A, pp. 1, 2 of Petition).

The San Diego office of petitioner employed as agents, employees and registered representatives Phillip Jay and Donald Foley (R. 24, 25).

The petitioner maintained at its San Diego office trading accounts for several Utah residents, including respondents, through which buy and sell transactions occurred in securities listed on the New York Stock Exchange or other registered exchanges and in unlisted securities (R. 25). Of these accounts, the accounts of respondent Markakis and the witness Joe Santi appeared to have been opened in November 1967 (R. 65, 103); the account of Vic Santi opened October 31, 1968 (R. 126); the account of Mike Dmitrich opened September 25, 1969 (R. 131); and the account of the respondents Piantes opened approximately September 4, 1969 (R. 137).

On October 27, 1969, respondent Markakis purchased from petitioner, acting as agent, 1,000 shares of Occidental Petroleum Corp. preferred stock at a cost of $43,656.30; on October 28, 1969, Markakis purchased from petitioner, acting as principal, 1,000 shares of King Resources Company common stock at a cost of $28,875; on December 18, 1969, Markakis purchased from petitioner, acting as agent, 1,000 shares of Royal Inns of America common stock at a cost of $28,330 (App. A, p. 2 of Petition; Def's. Ex. 5). On November 3, 1969, respondents Piantes sold through petitioner 150 shares of Royal Inns of America common stock, and on November 19, 1969 purchased 200 shares of Blue Chip Stamps common stock (R. 136; Plf's. Ex. B) from petitioner, acting as principal, for a net purchase price of $4,300.

Numerous telephone and personal solicitations were made by representatives of petitioner to solicit purchase and sales transactions of various securities, which solicitations were directed to respondents and other residents of Utah (App. E, p. 20 of Petition).

On May 5, 1970, respondents Piantes wrote to petitioner demanding recission of the transaction whereby they purchased shares of Blue Chip Stamps and requested a return of the $4,300 paid as consideration therefor (Plf's. Ex. C). The offer was not accepted by petitioner (R. T. 143). Mr. Foley then contacted respondents Piantes and asked them to reconsider (R. T. 144). Being unsuccessful in their attempt to recover the consideration paid for the Blue Chip Stamps common stock, and upon advice from their banker, attorney, and upon reading a newspaper article that petitioner was having financial problems, respondents Piantes demanded good delivery to them of the Blue Chip Stamp certificates, and the balance of their account at Hayden-Stone, Inc. (R. T. 142, 151; Def's. Ex. 7). On October 5, 1970, they again of-

fered to rescind the transaction and tendered to petitioner the certificates representing their shares of Blue Chip Stamps common stock (Plf's. Ex. D).

On May 27, 1970, respondent Markakis tendered to petitioner the stock of Occidental Petroleum, King Resources and Royal Inns of America owned by him, and demanded return of the consideration paid therefor (Def's. Ex. 6).

Being unsuccessful in all such attempts, respondents initiated actions against petitioners to recover the purchase price of the securities under remedies afforded by Section 22(1) of the Utah Uniform Securities Act.

After respondents learned that petitioner was not licensed as a broker-dealer in the State of Utah, they conducted no further business with petitioners. At no time were respondents officers, directors, agents or employees of petitioners (App. A, p. 3; App. B, p. 8 of Petition).

Based on the evidence at trial, the Seventh Judicial District Court of Carbon County, Utah found that petitioner had directed at least 86 solicitations of offers to buy or sell securities into the State of Utah to persons residing in and present in Utah, which persons were not institutional buyers or otherwise exempt persons (App. A, p. 3; App. B, pp. 8-9 of Petition), and granted judgments in favor of respondents against petitioners for the amount paid by respondents as consideration for the securities involved, together with interest from the date of payment, costs and attorney's fees (App. C, p. 15; App. D, p. 17 of Petition).

On September 27, 1973, the Supreme Court of Utah, in a unanimous opinion written by Justice Ellett, affirmed the judgment of the trial court. 30 Utah 2d ...., 514 P. 2d 529 (1973).

REASONS FOR DENYING WRIT

The respondents oppose the Petition for Writ of Certiorari on four grounds:

I.

The Untimely Filing of the Petition Deprives This Court of Jurisdiction Over the Case.

The Petition for Writ of Certiorari is plainly out-of-time. The judgment of the Supreme Court of the State of Utah was entered and filed September 27, 1973, simultaneous with its opinion. No rehearing was sought or denied.

Pursuant to the provisions of 28 U.S.C. §2101(c), the Petition for Writ of Certiorari must be applied for "within ninety days after the entry of such judgment or decree" — in other words, no later than December 26, 1973. Although petitioner filed an Application for Extension of Time Within Which to File Petition for Writ of Certiorari, on or about January 16, 1974, such Application was denied by Mr. Justice White on January 17, 1974. Thus, no extension of the filing deadline was obtained from a justice of this Court.

The Petition was actually filed on December 27, 1973, after the expiration of the December 26 deadline. Where, as here, the time for filing a petition is established by an Act of Congress, rather than a rule of this Court. such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for the Court to waive the untimeliness or to entertain the Petition. As stated in *Dep't. of Banking v. Pink,* 317 U. S. 264, 268, 87 L. Ed. 254, 63 S. Ct. 233 (1942), such a petition "must . . . be denied for lack of jurisdiction." See also *Teague v. Comm'r. of Customs,* 394 U. S. 977, 22 L. Ed. 2d 756,

89 S. Ct. 1457 (1969), *rehearing denied,* 395 U. S. 930, 23 L. Ed. 2d 251, 89 S. Ct. 1768 (1969), where a Petition for Writ of Certiorari was denied when it arrived two days late for filing because of a severe snow storm which had interrupted the mails. In *Schacht v. United States,* 398 U.S. 58, 63-65, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970), the Court emphasized that a waiver of untimeliness can be made only where a rule of this Court, rather than a statute, establishes the time requirement.

II.

Petitioner Failed to Raise the Federal Question in the Courts Below.

As a general rule, the Supreme Court will refuse to consider an argument not raised below. Rule 23(1)(f) of the Supreme Court Rules requires disclosure of the method and manner by which federal questions sought to be reviewed were raised in the first instance in the courts below, and the way in which they were passed upon by such courts. Such requirement is imposed to " . . . show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioner has admitted in its Petition that federal questions were not raised below (Petition, p. 7).

Under the statute controlling the Supreme Court's power to review final judgments of state courts (28 U.S.C. §1257(3)), the Supreme Court lacks jurisdiction to determine the constitutionality of a state statute where the sole federal question has never been raised, preserved or passed upon by the state court below, and the Supreme Court will not decide federal constitutional issues raised for the first time on review of state court decisions. *Cardinale v. Louisiana,* 394 U. S. 437, 439, 22 L. Ed. 2d 398, 401, 89

S. Ct. 1162 (1969); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assoc.,* 360 U. S. 334, 342, 3 L. Ed. 2d 1280, 1286, 79 S. Ct. 1196 (1959); *State Farm Mutual Automobile Insurance Co. vs. Duel,* 324 U. S. 154, 157-163, 89 L. Ed. 812, 817-819, 65 S. Ct. 753 (1945). See also *Monks v. New Jersey,* 398 U. S. 71, 26 L. Ed. 2d 54, 90 S. Ct. 1563 (1970).

III.

There Exists No Federal Question.

The decision of the Utah Supreme Court was based on adequate, independent, non-federal grounds. The Utah Supreme Court held that petitioner was subject to the licensing and registration requirements of the Utah Uniform Securities Act, that its transactions with Utah residents were not exempt from the Act and that respondents were entitled to rescind those transactions whereby they purchased securities from or through petitioner. The court considered the question of jurisdiction by the Utah courts over the petitioner and the voidability of the transactions of respondents. Its holding that the Utah courts had jurisdiction over petitioner to make the judgments rendered, and that transactions by purchasers with unregistered brokers are voidable at the election of purchasers were based on the provisions of the so-called Utah "long-arm statute" (§78-27-22, U.C.A. 1953), the substituted service provision of the Utah Uniform Securities Act (§61-1-26(7), U.C.A. 1953), and an interpretation of the remedies afforded by the provisions of Section 22 of the Utah Uniform Securities Act (§61-1-22(1) U.C.A. 1953). (App. E, p. 19 of Petition). The decision of the Utah Supreme Court is clearly correct.

The federal questions asserted by petitioner are either insubstantial or not actually presented by the record. It is essential for Supreme Court jurisdiction under 28 U.S.C.

§1257(3) to review a state court decision that it be shown that a state court actually decided a federal question. This petitioner has failed to do. As such, this Court lacks jurisdiction to review the decision of the Utah Supreme Court. *Herb v. Pitcairn,* 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945); *Black v. Cutter Laboratories,* 351 U.S. 292, 100 L. Ed. 1188, 76 S. Ct. 824 (1956); *Johnson v. Thornburg,* 276 U.S. 601, 72 L. Ed. 725, 48 S. Ct. 322 (1928); *Wilson v. Loew's, Inc.,* 355 U.S. 597, 2 L. Ed. 2d 519, 78 S. Ct. 526 (1958).

By unlawfully transacting business in the State of Utah while not properly licensed as a broker-dealer by the Utah Department of Business Regulation, petitioner subjected itself to the remedies provided by Section 22 of th Utah Uniform Securities Act, which are intended to compel broker-dealer compliance with the registration and licensing requirement. Absent compliance, petitioner must assume the consequences of its negligent or intentional acts. Although petitioners claim that the remedies afforded by Section 22 are excessive and thwart federal policy (Petition, p. 22), there appears no Congressional pronouncement to substantiate such claim, and the amount of recovery afforded a purchaser pursuing a claim under Section 22 depends on the dollar amount of the unlawful transactions. Petitioners merely seek to avoid their statutory liability, but that does not convert a correct decision by the Utah Supreme Court in a simple case to an important question of federal law or constitutional issues.

IV.

There is No Federal Pre-emption of State Regulation of the Securities Industry.

When Congress adopted the Securities Act of 1933 (15 U.S.C. §77a, *et seq.*), and the Securities Exchange

Act of 1934 (15 U.S.C. §78a, *et seq.*), 47 states had "blue sky" laws at that time. *Crosby v. Weill,* 382 Ill. 538, 48 N.E. 2d 386 (1943). That Congress did not intend to supercede state regulation of the securities industry is evidenced from its specific pronouncement in Section 18 of the 1933 Act (15 U.S.C. §77r) that:

> Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

Section 28(a) of the 1934 Act (15 U.S.C. §78bb) states:

> The rights and remedies provided by this title shall be in additon to any and all other rights and remedies that may exist at law or in equity; . . . Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

Similar provisions are set forth in Section 21 of the Public Utility Holding Company Act of 1935 (15 U.S.C. §79u), Section 326 of the Trust Indenture Act of 1939 (15 U.S.C. §77zzz), Section 50 of the Investment Company Act of 1940 (15 U.S.C. §80a-49) and Section 222 of the Investment Advisers Act of 1940 (15 U.S.C. §80b-18a).

Every state having adopted any form of securities regulation legislation requires registration and licensing of broker-dealers. Such registration is intended to prevent fraudulent or unquailfied persons from entering the securities business, to supervise their activities within the state once registration has been achieved, and to remove

them from registration if they fall below any of the statutory standards. 1 Loss, *Securities Regulation* (2d Ed. 1961, Supp. 1969) 34, 43.

Since 1919, Utah has had a statutory scheme of regulation of the securities industry. In 1963, Utah adopted the current Utah Uniform Securities Act. That state regulation of the securities industry is a proper function of the police power of the states has long been recognized as not imposing an undue burden on interstate commerce or violative of the Fourteenth Amendment. See *Hall v. Geiger-Jones Co.*, 242 U.S. 359, 61 L. Ed. 480, 37 S. Ct. 217 (1917); *Caldwell v. Sioux Falls Stockyards Co.*, 242 U.S. 559, 61 L. Ed. 493, 37 S. Ct. 224 (1917); *Merrick v. N. W. Halsey & Co.*, 242 U.S. 568, 61 L. Ed. 498, 37 S. Ct. 227 (1917); *Travelers Health Assoc. v. Commonwealth of Virginia, ex rel. State Corp. Comm'n.*, 339 U.S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1950).

In *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, ... U.S. ....., 38 L. Ed. 2d 348, 366, 94 S. Ct. ..... (1973), this Court quoted Mr. Justice Brennan from the opinion in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210 (1963) relative to the issue of federal pre-emption:

> Federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

There exist no persuasive reasons for concluding that the national government has pre-empted state regulation of the securities industry, or specifically, the registration and licensing of broker-dealers, nor has Congress so ordained. Contrarily, Congress has specifically stated that

federal regulation shall be concurrent with state regulation, a doctrine recently acknowledged by this Court in the *Ware* case in which Mr. Justice Blackmun stated at 38 L. Ed. 2d 364, 365:

> Indeed, Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation.

State regulation of the securities industry within a state encompassing registration and licensing of broker-dealers, and providing remedies to purchasers for non-compliance by a broker-dealer, in no way offends or conflicts with federal regulation of the securities industry or broker-dealers.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Warren M. Weggeland
692 Kennecott Building
Ten East South Temple
Salt Lake City, Utah 84133

Counsel for Respondents

March 4, 1974

LIBRARY
SUPREME COURT, U. S

In the Supreme Court of the United States

Octtober Term, 1973

No. 73-1009

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

Petitioners,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,

Respondents.

HAYDEN, STONE INCORPORATED, a Delaware corporation,

Petitioner,

vs.

ALEX M. MARKANKIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF AMICUS CURIAE

VERNON B. ROMNEY
Attorney General of Utah

Offices of the Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: 801-328-5261

INDEX

	Page
INTEREST OF AMICUS	2
QUESTION PRESENTED	2
ARGUMENT	2
CONCLUSION	6

Table of Authorities

Cases

Marketlines, Inc. v. *Chamberlain*, 63 Ill. App. 2d 274, 211 N. E. 2d 399 (1965)	4
Retail Clerks Internat'l Ass'n, Local 1625, *AFL-CIO* v. *Schermerhorn*, 375 U. S. 96 (1963)	3
Traveler's Health Ass'n v. *Commonwealth*, 188 Va. 877, 51 S. E. 2d 263, *aff'd* 339 U. S. 643 (1949)	4

Statutes

Securities Act of 1933, § 18	3
Securities Act of 1933, § 3(a) (11)	3
Securities Exchange Act of 1934, § 15(a) (1)	3
Uniform Securities Act § 410	5
Utah Code Annotated § 61-1-1 (1953)	5
Utah Code Annotated § 61-1-22 (1953)	5

Secondary Authorities

69 *Am. Jur. 2d Securities Regulation — States* § 2 (1973)	3
Blue Sky Laws — Uniform Securities Act, 3 *B. C. Ind. & Comm. L. Rev.* 455 (1962)	5

INDEX—Continued

	Page
Cary, *Corporations* (4th ed. 1969)	4
Hays, *State "Blue Sky" and Federal Securities Laws*, 11 *V. and L. Rev.* 659 (1958)	3
Jennings, *The Role of the States in Corporation Regulation and Investor Protection*, 23 *Law & Cont. Prob.* 193 (1958)	2
Jennings and Marsh, *Securities Regulation* (2d ed. (1968)	3
Loss and Cowett, *Blue Sky Law* (1958)	5
Uniform Securities Act, 12 *Stan. L. Rev.* 105 (1960)	5

In the Supreme Court of the United States

Octtober Term, 1973

No. 73-1009

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

Petitioners,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,

Respondents.

HAYDEN, STONE INCORPORATED, a Delaware corporation,

Petitioner,

vs.

ALEX M. MARKANKIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF AMICUS CURIAE

The Attorney General of the State of Utah respectfully moves the Court for permission to file this brief as Amicus Curiae.

The Attorney General of Utah prays that a writ of

certiorari not issue to review the judgments of the Supreme Court of the State of Utah entered in the above cases on September 27, 1973.

INTEREST OF AMICUS

The State of Utah's Blue Sky laws, which are a product of the Uniform Securities Act, are being challenged by the petitioner. The State of Utah is deeply interested in preserving the system of concurrent jurisdiction among state and federal governments in the field of securities regulation.

QUESTION PRESENTED

Should the Supreme Court of the United States grant petitioner's petition for writ of certiorari to review the available civil remedies of the Utah "Blue Sky" laws?

ARGUMENT

The role of the states in providing investment regulation and protection was defined in Jennings, *The Role of the States in Corporation Regulation and Investor Protection*, 23 *Law & Cont. Prob.* 193 (1958), as follows:

> This is a large country, and it is to be expected that there will be strong differences of opinion, sectional and otherwise, with respect to corporation and securities legislation . . . One of the virtues of our federal system is that the national government may set a minimum standard of regulation and leave to the states the opportunity to take additional measures if they so desire. *Id.* at 230.

Congress has enacted various federal securities acts; however, it has not pre-empted the field of securities regu-

lation. Hays, *State "Blue Sky" and Federal Securities Laws*, 11 *V. and L. Rev.* 659, 660 (1958). All but a few states regulate in one form or another the distribution of securities. Jennings & Marsh, *Securities Regulation* 524 (2d ed. 1968).

The Court in *Retail Clerks Internat'l Ass'n, Local* 1625, *AFL-CIO* v. *Schermerhorn*, 375 U. S. 96 (1963) holds that when determining whether Congress has precluded state enforcement of select state laws adopted pursuant to its authority, that the purpose of Congress is the ultimate touchstone. Congress has specifically articulated its purpose regarding the securities field by its enactment of the Securities Act of 1933, § 18, 48 Stat. 85, 15 U. S. C. § 77(r) (1952), which expressly preserves state regulation, even though the issue is required to be registered under the Federal Act.

> Nothing in this Subchapter shall affect the jurisdiction of the securities commission of any State . . . of the United States . . . over any security or any person.

Thus, the Securities Act of 1933 expressly provides for concurrent operation with State laws rather than for federal pre-emption of the securities field. Hays, *State "Blue Sky" and Federal Securities Laws*, 11 *Vand. L. Rev.* 659, 660 (1958). A further expression of congressional intent is the fact that Congress has enacted a number of intrastate exemptions in the various federal securities acts, thus preserving the states' right to regulate. 69 *Am. Jur. 2d* 1060, *Securities Regulation — States* § 2 (1973). Cf. Securities Act of 1933, § 3(a)(11) and Securities Exchange Act of 1934, § 15(a)(1).

The Supreme Court of Virginia, when faced with a federal pre-emption question, concluded that the states are free to exercise such regulatory control over the sale of securities if it does not conflict with or violate any provision of the Federal Constitution. In absence of such conflict, it is contemplated that the states and the federal government shall exercise concurrent jurisdiction in the securities field. See *Traveler's Health Ass'n* v. *Commonwealth*, 188 Va. 877, 51 S. E. 2d 263, *aff'd* 339 U. S. 643 (1949). In a similar fashion, the Court, in *Marketlines, Inc.* v. *Chamberlain*, 63 Ill. App. 2d 274, 211 N. E. 2d 399 (1965), concluded that state securities laws

> . . . are a proper use of police power to insure that only competent individuals of integrity act in the securities field for the welfare of the people of the state, and although plaintiff may be engaged in interstate commerce, the incidental inconvenience which may be caused plaintiff must yield to the public welfare. The federal government has not preempted this area of activity, and plaintiff should not be permitted to act as an investment advisor in the State . . . until it complies with the . . . Act. *Id.* at 403.

Cary, *Corporations* (4th ed. 1969), concludes that state blue sky laws appear to be a necessary part of the securities regulation scheme.

> [T]he SEC has itself recognized explicitly, disclosure is often not enough, for naive investors seldom examine the available facts and commonly are not sophisticated enough to make proper use of them if they do. *Id.* at 1477.

In an effort to protect the investing public and more adequately regulate the securities industry, the 1963 Utah State Legislature enacted the model Uniform Securities Act, as provided in Utah Code Ann. § 61-1-1, et seq. (1953). The flavor of federal law running throughout the Uniform Act looks toward better coordination between state and federal securities laws. *Blue Sky Laws — Uniform Securities Act*, 3 *B. C. Ind. & Comm. L. Rev.*, 455, 465 (1962). The drafters of the Uniform Act, Loss and Cowett, *Blue Sky Law* (1958), comment on the act as follows:

> At any rate, our dual system of federal-state regulation in the securities field is too firmly fixed to make federal preemption even remotely practicable. The only hope for simplification lies in uniformity and federal-state coordination. *Id.* at 237-38.

We admit that the Uniform Securities Act § 410 (Utah Code Ann. § 61-1-22 (1953)), which creates civil liability for violations of the Act, represents a form of strict liability which is justified by the fact that the civil remedies are intended to complement enforcement of the criminal provisions. Accordingly, the Act carefully defines the instances in which a purchaser of securities may hold the seller or certain other parties liable in a civil action. See the *Uniform Securities Act*, 12 *Stan. L. Rev.* 105, 177-78 (1960).

It is the conclusion of this brief that federal and state governments enjoy concurrent jurisdiction in the area of securities regulation. The federal government has not preempted this field. States are free to exercise regulatory con-

trol over the sale of securities if they do not conflict with or violate federal statutory or constitutional provisions.

CONCLUSION

The Attorney General of the State of Utah urges the Court to deny petitioner's writ of certiorari in this proceeding.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General of Utah

Offices of the Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Telephone: 801-328-5261

SUPREME COURT, U. S.
FILED
APR 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1009 Civil

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,

Respondents.

HAYDEN, STONE INCORPORATED, a Delaware corporation,

Petitioner,

vs.

ALEX M. MARKAKIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

PETITION FOR REHEARING.

WALTER S. WEISS,
1900 Avenue of the Stars,
Suite 1900,
Los Angeles, Calif. 90067,
Counsel for Petitioner.

Of Counsel:
LONG & LEVIT,
RICHARD B. WOLF,
LOIS G. ANDREWS,
1900 Avenue of the Stars,
Suite 1900,
Los Angeles, Calif. 90067.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

I. Page

Grounds for Rehearing 1

II.

Chronology of the Events 2

III.

Nature of the Case and Questions Presented by the Petition for Writ of Certiorari 3

IV.

The Causes of the Untimely Filing Constitute Intervening Circumstances of Substantial or Controlling Effect 4

V.

The Court Has the Power to Grant a Hearing in a Case Where the Petition for Writ of Certiorari Was Filed Out of Time as a Result of Excusable Neglect and Events Beyond the Petitioner's Control 4

VI.

Because of the Extenuating Circumstances and the Fact That No Prejudice Resulted to Respondents As a Result of the One Day's Delay in Filing the Initial Petition, a Rehearing Should Be Granted in This Case 8

VII.

Conclusion 9

INDEX TO EXHIBITS

Exhibit A—Affidavit of Walter S. Weiss 1

Exhibit B—Affidavit of Richard B. Wolf 3
Calendars for Years 1972, 1973, 1974.

Exhibit C—Affidavit of Lois G. Andrews 7

TABLE OF AUTHORITIES CITED

Cases	Page
Department of Banking v. Pink (1942) 317 U.S. 264, 87 L.Ed. 254, 63 S.Ct. 233	5
Ray v. Pierson (1967) 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213	4
Richardson v. Green (1889) 130 U.S. 104, 32 L. Ed. 872, 95 S.Ct. 443	5
Schacht v. United States (1970) 398 U.S. 58, 26 L.Ed.2d 44, 90 S.Ct. 1555	5
Walter D. Teague III, et al. v. Regional Commissioner of Customs, Region II, et al. (1969) 394 U.S. 977, 22 L.Ed. 756, 89 S.Ct. 1457	4, 5
Union National Bank v. Lamb (1949) 337 U.S. 38, 93 L.Ed. 1190, 69 S.Ct. 911	6, 7
United Public Workers v. Mitchell (1946) 330 U.S. 75, 91 L.Ed. 754, 67 S.Ct. 556	5, 6
Wolfsohn v. Rabb (E.D.Pa., 1951) 11 F.R.D. 254	7
Rules	
Federal Rules of Civil Procedure, Rule 6(a)	6, 7
Federal Rules of Civil Procedure, Rule 6(b)	6, 7
Federal Rules of Civil Procedure, Rule 60	7
Supreme Court Rules, Rule 34.1	7
Supreme Court of the United States, Rule 58(2)	1, 4
Statutes	
Uniform Securities Act, Sec. 410	3
United States Code, Title 28, Sec. 2101(c)	2, 4, 5, 6, 7, 9
United States Code, Title 28, Sec. 2103	7
United States Constitution, Fourteenth Amendment	4

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1009 Civil

HAYDEN, STONE INCORPORATED, a Delaware corporation, and HS EQUITIES, INC., a corporation,

Petitioner,

vs.

GUS T. PIANTES and MARY M. PIANTES, his wife,

Respondents.

HAYDEN, STONE INCORPORATED, a Delaware corporation,

Petitioner,

vs.

ALEX M. MARKAKIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's Order, dated March 25, 1974, denying the Petition for a Writ of Certiorari to the Supreme Court of the State of Utah, and, in support thereof, respectfully shows:

I.

Grounds for Rehearing.

The intervening circumstances of substantial or controlling effect, constituting the basis of this Petition (Supreme Court Rule 58(2)), consist of the facts, that

(1) The Petition for Writ of Certiorari in this case was docketed one day out of time due to the excusable neglect of petitioner's counsel in computing the time within which the Petition had to be filed, the intervention of the Christmas holiday season, and the distance and time difference between Los Angeles and Washington, D. C.; and

(2) This is the first opportunity for petitioner to apprise the full court of the causes of tardiness, and to urge the court to grant Certiorari despite the untimely filing of the initial petition.

II.
Chronology of the Events.

The judgments of the Supreme Court of the State of Utah were made and entered on September 27, 1973. Under Section 2101(c) of Title 28 of the United States Code, the last day for filing a Petition for Writ of Certiorari was, therefore, December 26, 1973. The Petition was received by the Clerk of this Court at 9:00 A.M., on December 27, 1973.

On or about January 14, 1974, petitioner presented to Mr. Justice White an Application for Extension of Time to File the Petition for Writ of Certiorari out of time. The Application was denied on January 17, 1974.

On January 22, 1974, the attorney for respondents wrote a letter to the Clerk of the Court, stating that, because (1) the Petition was filed out of time, (2) the Application for Extension of Time had been denied, and (3) the case "clearly does not warrant review by this Court (as shown by the Opinion of the Utah Supreme Court)," respondents waived the right to file a brief in opposition. On February 4, 1974, the

Clerk wrote a letter to the attorney for respondents, stating that the Court had directed him to request that a response be filed in this case.

On or about March 4, 1974, respondents filed a brief in opposition. On or about March 14, 1974, the Attorney General of the State of Utah filed an Amicus Curiae Brief, urging that the Petition for Writ of Certiorari be denied.

On March 25, 1974, the Court denied the Petition for Writ of Certiorari "as untimely filed."

III.

Nature of the Case and Questions Presented by the Petition for Writ of Certiorari.

Petitioner, at all times relevant hereto, was a nationwide stock brokerage house licensed to transact business in 42 states and was a member of several major securities exchanges. Respondents are former customers of petitioner. They obtained judgments against petitioner in the amount of $127,873.04. The judgments are in the gross amount of certain of respondents' stock market losses in transactions with petitioner. Liability was imposed under Section 410 of the Uniform Securities Act, because, at the time of the transactions, petitioner had failed to obtain a broker-dealer's license from the Utah Department of Business Regulations. The judgments were affirmed by a published opinion of the Utah Supreme Court.

The questions presented by the Petition for Writ of Certiorari are (1) whether federal regulation of the securities industry preempts the penalty provision imposed upon petitioner under Section 410 of the Uniform Securities Act, (2) whether the application of that

provision unreasonably burdens interstate commerce, and (3) whether the penalty provision violates the due process clause of the Fourteenth Amendment because of the lack of a rational relationship between the purpose of the statute and the imposition of liability without fault.

IV.

The Causes of the Untimely Filing Constitute Intervening Circumstances of Substantial or Controlling Effect.

Petitioner has never addressed the full membership of the Court on the subject of the Court's power to grant a petition for writ of certiorari filed out of time. Since the Court denied the Petition "as untimely filed," the extenuating circumstances explaining the tardy filing of the Petition constitute "intervening circumstances of substantial or controlling effect," within the meaning of Rule 58(2) of this Court.

V.

The Court Has the Power to Grant a Hearing in a Case Where the Petition for Writ of Certiorari Was Filed Out of Time as a Result of Excusable Neglect and Events Beyond the Petitioner's Control.

The most persuasive evidence of the power of the United States Supreme Court to grant certiorari and decide on the merits civil cases in which the petition for a hearing was filed after the ninety-day period of 28 U.S.C. §2101(c), is the simple fact that in recent years the Court has done so. (See *e.g., Ray v. Pierson* (1967) 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213; cited in dissent by Mr. Justice Black (joined by Mr. Justice Douglas) from a denial of certiorari in *Walter D. Teague III, et al. v. Regional Commissioner of Cus-*

toms, Region II, et al. (1969) 394 U.S. 977, 22 L.Ed. 756, 760, 89 S.Ct. 1457.) Such a practice is consistent with cases decided under the predecessors of Section 2102(c), holding that the Court has power to waive the time requirements in appropriate cases on appeal. (See, *e.g., Richardson v. Green* (1889) 130 U.S. 104, 111, 32 L.Ed. 872, 874, 95 S.Ct. 443.)

Some of the decisions of the Court have suggested that, while the Court has power to waive the requirements of its own rules, it lacks the power to waive time limits established by statute. (See, *e.g., Schacht v. United States* (1970) 398 U.S. 58, 63-64, 26 L. Ed.2d 44, 49, 90 S.Ct. 1555.) Aside from the fact that such statements, as well as the "jurisdictional" language contained in cases denying certiorari (*e.g., Department of Banking v. Pink* (1942) 317 U.S. 264, 268, 87 L.Ed. 254, 257, 63 S.Ct. 233), is refuted by the Court's practice of granting certiorari in civil cases of late filing, there is express authority by the Court that the supposed distinction between rule and statute is not controlling. In *United Public Workers v. Mitchell* (1946) 330 U.S. 75, 91 L.Ed. 754, 67 S.Ct. 556, the Court considered the effect of the statutory time limit for docketing a record on appeal. The statute involved read as follows:

> "In the event that an appeal is taken under this section, the record *shall* be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts." (Former 28 U.S.C.A. §380a, 8 F.C.A. Title 28, §380a. Emphasis added.)

The Court held that compliance with the provisions of the statute as to docketing the record on appeal, although phrased in mandatory language, was *not* a "prerequisite to the power of this Court to review . . . We do not construe the requirement of docketing within sixty days as a limitation on our *power* to hear this appeal." (330 U.S. at 85-86, 91 L.Ed. at 765. Emphasis added.)

In circumstances such as these, the Court should draw upon the policy fostered by Congress in its concurrence with the provisions of Rule 6(b) of the Rules of Civil Procedure for the United States District Courts, which reads in relevant part as follows:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done *where the failure to act was the result of excusable neglect. . . .*" (Emphasis added.)

Such an approach was taken by the Court in *Union National Bank v. Lamb* (1949) 337 U.S. 38, 93 L. Ed. 1190, 69 S.Ct. 911. That case presented a factual setting very similar to that of the case at bench. There, the last day for filing a petition under §2101-(c)—the same statute involved here—fell on a Sunday. The petition was filed the next day. There was no statutory provision allowing for such late filing. The Court invoked the lenient policy of Rule 6(a) of the Federal Rules of Civil Procedure, applicable by its terms only to proceedings in the District Courts, and granted a hearing in the case. That Rule, the equivalent of pres-

ent Rule 34.1 of the Supreme Court Rules, provided that, when the last day for performance of an act fell on a Sunday or legal holiday, performance on the next day which is not a Sunday or legal holiday is timely. In finding that the policy articulated by the Rule constituted a gloss upon §2101(c), the Court stated as follows:

> "That rule provides the method for computation of time prescribed or allowed not only by the rules or by order of court but by 'any applicable statute.' Since the rule had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. 1948 ed. §2101(c). The appeal[1] therefore did not fail for lack of timeliness." (337 U.S. at 40-41, 93 L.Ed. at 1194. Court's footnotes omitted.)

Under a similar analysis, it is seen that the same statute, §2101(c), is no more in conflict with subdivision (b) of Rule 6 than with the provisions of subdivision (a) of that rule. Nor is there any conflict between Rule 6(b) and the Supreme Court Rules. Therefore, the lenient policy of Rule 6(b) should apply, and this Petition should be granted. (*Wolfsohn v. Rabb* (E.D.Pa., 1951) 11 F.R.D. 254 [attorney's miscalculation of time by one day constituted excusable neglect within meaning of similar language of Rule 60 of Federal Rules of Civil Procedure].)

---

[1]Although the petitioner sought to bring the case to the Supreme Court by appeal, the proceeding was treated as a Petition for Certiorari, pursuant to 28 U.S.C., §2103. (337 U.S. at 39-40, 93 L.Ed. at 1193.)

VI.

Because of the Extenuating Circumstances and the Fact That No Prejudice Resulted to Respondents as a Result of the One Day's Delay in Filing the Initial Petition, a Rehearing Should Be Granted in This Case.

The unfortunate circumstances surrounding the untimely filing of the Petition for Writ of Certiorari are recited in detail in the affidavits of Walter S. Weiss, Richard B. Wolf and Lois G. Andrews, attached hereto as Exhibits A, B, and C, respectively, and incorporated herein by reference. As can be seen from a review of the affidavits, a bizarre repetition of errors in computation of the due date of the Petition for Writ of Certiorari, compounded by the intervention of four consecutive court and business holidays, and the distance and time difference between Los Angeles and Washington, D.C., caused the filing of the Petition to be one day late. This is not a case where the statute or the rules of the Supreme Court of the United States were disregarded by petitioner. To the contrary, as shown in the affidavit of Richard B. Wolf, efforts were made to coordinate the preparation and printing of the Petition for Writ of Certiorari for the express purpose of filing the Petition ahead of the supposed deadline. Despite the error in computation, it appears from the affidavits that, had the printer not suspended its operations on December 24, 1973 (as was originally stated to petitioner's counsel would not be the case), the Petition would have been filed by December 26, 1973, and thus would have been timely. The problem encountered by petitioner, therefore, was that, even though petitioner's counsel worked over the weekend to have the Petition filed ahead of time, the intervention of four

consecutive business holidays (Dec. 22, 23, 24 and 25), rendered the effort futile.

Absolutely no prejudice resulted to respondents as a result of the delay of one day in the filing of the Petition for Writ of Certiorari. Respondents, having been alerted to the untimely filing by petitioner's straightforward attempt to obtain relief by application to Mr. Justice White, asserted in their opposition brief that a failure to comply with §2101(c) precludes the Court from considering the Petition. However, respondents did not advert to a single fact or circumstance showing that respondents had suffered any prejudice by reason of the delay. In view of the lack of prejudice to respondents, the notion of fairness, combined with the preference for a hearing on the merits of a matter presenting the important issues involved in this case, should cause the Court to reconsider its denial of the initial Petition.

VII.

Conclusion.

For the foregoing reasons, it is respectfully urged that this Petition for a Rehearing be granted, and that upon further consideration, Writ of Certiorari issue to the Supreme Court of the State of Utah.

Dated: April 2, 1974.

WALTER S. WEISS,
Counsel for Petitioner.

Of Counsel:
LONG & LEVIT,
RICHARD B. WOLF,
LOIS G. ANDREWS,

Certificate of Counsel.

I, WALTER S. WEISS, counsel for the above-named petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

Dated: April 2, 1974.

WALTER S. WEISS,
Counsel for Petitioner.

EXHIBIT A.

Affidavit of Walter S. Weiss.

State of California,
County of Los Angeles—ss.

WALTER S. WEISS, duly sworn, says:

1. I am a member of the bar of this Court, duly licensed to practice law in the State of California and the Los Angeles managing partner of the firm of Long & Levit. I had primary responsibility for the final preparation of the Petition for Writ of Certiorari in the above action.

2. Although Long & Levit took no active part in either the trial or appeal in the Utah courts, this law firm was involved initially in the controversy, since the San Diego, California, office of petitioner was involved in the proceedings. After the decision of the Supreme Court of Utah was rendered, I had discussions with our client during October and November, 1973, concerning the possibility of filing a petition for writ of certiorari.

3. Although petitioner was initially uncertain in deciding whether a petition for writ of certiorari would be filed, when the decision in this Court in *Merrill Lynch v. Ware* was announced on December 4, 1973, we were instructed to proceed forthwith in preparing the petition.

4. After I received these instructions from our client, I made a calculation of the time within which the petition had to be filed. In doing this, I consulted my calendar and determined that the decision of the Supreme Court of Utah was rendered on the 270th day of 1973. I excluded that day and added 90 to day

271 and thereby determined, albeit erroneously, that the last day for filing a petition was the 361st day of 1973, which was December 27, 1973. I told Lois G. Andrews and Richard B. Wolf of my calculation and requested that each independently verify this rather tight time schedule. Each assured me that the last day for filing a petition was December 27, 1973.

5. I reviewed the original draft of the Petition and participated in revising the galley proofs. The revision of the galley proofs took place on December 22, 23, and 24, 1973. The corrected galley proofs were redelivered to the printer for final preparation some time after noon on December 24, 1973. But for the distance and time difference between Los Angeles and Washington, D.C., and the intervening 4 court holidays, the Petition would have been printed and filed not later than the 89th day.

6. I am unaware of any prejudice which might result to the respondents if this petition is granted.

/s/ Walter S. Weiss
WALTER S. WEISS

Subscribed and sworn to before me this 2nd day of April, 1974.

/s/ Ingrid Neustadter
Notary Public in and for said
County and State.

EXHIBIT B.

Affidavit of Richard B. Wolf.

State of California,
County of Los Angeles—ss.

RICHARD B. WOLF, being first duly sworn, states:

1. I am an attorney licensed to practice law in the State of California, and in the United States District Court for the Central District of the State of California.

2. I am an associate in the law firm of Long & Levit and am of counsel for petitioner in the above action on the Petition for Writ of Certiorari to the Supreme Court of the State of Utah.

3. In Mid-December, 1973, I was assigned responsibility for preparing said Petition, and causing the same to be filed in the Supreme Court of the United States. At that time I inquired of Lois G. Andrews, an associate also working on the Petition, when the time for filing a petition would expire. I was informed that it was either the 26th or the 27th of December, depending upon whether the date of entry of the judgment by the Utah Supreme Court was taken as the first day of the statutory period, or whether that day was omitted.

4. On or about December 14, 1973, I decided to ascertain for myself the last day for filing a petition, in order that the scheduling with the printer could be properly made. Twice on December 14, 1973, I counted off the statutory 90 day period following September 27, 1973, the date upon which the judgment in the Utah Court had been entered. Each time the 90th day appeared to fall on December 27, 1973. Attached hereto, marked Exhibit 1 and incorporated herein by reference is a true and correct copy of the calendar

which I used in counting the 90 day period. The pencilled notations upon the calendar were made by me during the process of counting. It is now apparent from examining the calendar why the error was made. The 30th day of September appears on the calendar in the upper lefthand corner of the space devoted to September, 1973. I thus omitted counting the 30th of September, 1973, and proceeded directly from the 29th of September to October 1, 1973, I am confident that the error would not have been made. had the calendar not been printed in such a misleading manner.

5. On December 17, 1973, I telephoned Parker & Son, Inc. ("Parker") and spoke with Miss Jean Drennen. Based upon the time computation described in the preceding paragraph, I informed her that the Petition was due to be filed on or before December 27, 1973. I inquired as to what schedule would have to be followed, in view of the intervening holidays, in order to meet that deadline. Upon my inquiry, Miss Drennen stated that Parker would be open and operating on December 24, 1973, Christmas Eve. She told me that, if our rough draft was received by Parker early Friday, December 21, 1973, the printer would work overtime over the weekend, and Parker would deliver galley proofs to us by Saturday, December 22, 1973. She stated that, if the corrected galley proofs were received back by Parker by December 26, 1973, Parker would arrange for the Petition to be filed in the Supreme Court of the United States by December 27, 1973. I stated that I did not want to "cut it so close," and that we would endeavor to return the corrected galley proofs to them by Monday, December 24, 1973, in order that the Petition could be filed by December 26, 1973.

6. From December 17, 1973, through December 21, 1973, I participated with Mrs. Andrews and Walter S. Weiss, attorney for petitioner, in the composition and revision of the Petition. On December 21, 1973, I telephoned Parker to make arrangements to have the rough draft picked up in order that the galleys could be printed. On that day, for the first time, I was informed by Miss Drennen that Parker would not be open and operating on the afternoon of December 24, 1973. At noon on December 21, 1973, Parker picked up the rough draft of the Petition.

7. At approximately 11:00 A.M. on December 22, 1973, Parker returned the galley proofs of the Petition to our office. On December 22, 23 and the morning of December 24, 1973, Mrs. Andrews, Mr. Weiss and I revised the galley proofs.

8. On December 24, 1973, I telephoned Parker and made arrangements for the pickup of the revised galley proofs. They were picked up by Parker at 12:30 P.M., December 24, 1973.

9. After learning that the Petition had been filed one day late, I telephoned Parker and ascertained that the completed Petition left Parker's premises at 7:00 P.M. on December 26, 1973, and that it was placed aboard the air freight compartment of American Airlines, Flight 378. That flight left Los Angeles International Airport at 10:35 P.M. (Pacific Standard Time) on the 26th and arrived at Dulles International Airport, Washington, D.C., at 7:32 A.M. (Eastern Standard Time) December 27, 1973. The Petition was served upon opposing counsel on December 26, 1973.

10. I was informed by the Assistant Clerk of the Supreme Court of the United States that the Petition

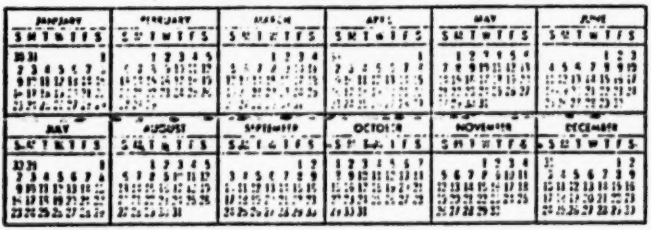
was filed at 9:00 A.M. (Eastern Standard Time) on December 27, 1973.

/s/ Richard B. Wolf
RICHARD B. WOLF

Subscribed and Sworn to before me this 27th day of March, 1974.

/s/ Ingrid Neustadter
Notary Public in and for said County and State.

CALENDAR FOR 1972



CALENDAR FOR 1973

JANUARY						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

FEBRUARY						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28			

MARCH						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

APRIL						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

MAY						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

JUNE						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

JULY						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

AUGUST						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

SEPTEMBER						
S	M	T	W	T	F	S
30						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29

OCTOBER						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

NOVEMBER						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

DECEMBER						
S	M	T	W	T	F	S
30	31					1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29

CALENDAR FOR 1974

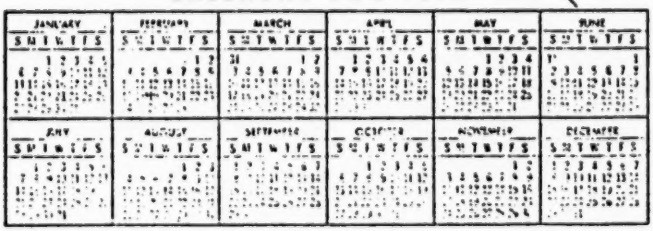


EXHIBIT C.

Affidavit of Lois G. Andrews.

State of California, County of Los Angeles—ss:

LOIS G. ANDREWS, being duly sworn, says:

1. I am licensed to practice law in the State of California, and in the United States District Court for the Central District of the State of California.

2. I am of counsel on the Petition for Writ of Certiorari in the above action. I participated in the writing of the Petition and in causing the same to be filed in the United States Supreme Court.

3. When I was assigned this case and began work on it, I made a determination of when the Petition was due to be filed. I first counted the time by weeks, starting on Thursday, September 27, 1973, the day that the judgment was entered in the Utah Supreme Court. I counted the period intervening between each successive Thursday as seven days. I went through this process twice, both times calculating that the due date was Wednesday, December 26, 1973, which was in fact the correct date. To confirm my calculations, I counted each day separately. Commencing with September 27 as the first day I counted ninety days, coming up again with December 26. I repeated this process in order to be absolutely sure that the Petition would be filed on time. Although I arrived at the correct date, I did so only because of two offsetting errors. The first error was counting the day the judgment was entered as day "one." The second error was failing to count September 30, due to its obscure placement on my calendar. I was aware of the possibility of the former error but, unfortunately, not of the latter error.

4. In mid-December, Walter S. Weiss, counsel in this cause, conferred with Richard B. Wolf, of counsel, and myself, concerning this case. During this conference I was asked when the Petition was due. I answered that it was due either December 26 or December 27, depending upon whether the day judgment was entered was counted as the first day. Shortly thereafter, upon the request of Mr. Weiss, I undertook to determine the rule governing the method by which time is computed for purposes of Supreme Court filings. I looked up Supreme Court Rule 34.1 which provides in pertinent part:

> "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default, after which the designated period of time begins to run is not to be included."

5. Learning that September 27 was not to be counted as the first day, it seemed logical, based upon my previous time computations, that December 27 would be the last day to file the Petition. However, I was not satisfied to rely upon such a deduction and undertook to recalculate the due date. I proceeded by the same two methods I had used previously, again going through each process twice. In each case I counted September 28 as the first day. Since I again omitted September 30 under the daily counting method, under both methods I arrived at December 27 as the date the Petition was due. I was confident that December 27, 1973, was the correct date because (1) each method of time computation had confirmed the result of the other, and (2) the result of December 27, reached in computations made after I became aware of Rule 34.1,

appeared to be consistent with the previous result of December 26.

5. I started writing the Petition on Friday, December 14, 1973. On that day, in a conference with Richard Wolf, the question as to the time available again arose. While in my presence, Mr. Wolf, using a different calendar than I had used, counted the days twice. Each time December 27 appeared to be the 90th day. Since Mr. Wolf's counting confirmed my counting and calculations, I was by this time positive that December 27 was, in fact, the 90th day.

/s/ Lois G. Andrews
LOIS G. ANDREWS

Subscribed and Sworn to Before Me This 27th day of March, 1974.

/s/ Ingrid Neustadter
Notary Public in and for said County and State.